U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 August 2003

CASE NO.: 2002-LHC-2962

OWCP No.: 03-28114

In the matter of

ROBERT S. LOVIS,
Claimant

v.

CONSOLIDATION COAL COMPANY,
Employer

APPEARANCES:

Stephen P. Moschetta, Esquire
For the Claimant

Jean E. Novak, Esquire
For the Employer

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et. seq*., hereinafter referred to as the "LHWCA" or the "Act" and the implementing regulations, 20 C.F.R. parts 701 and 702. The Act provides compensation to certain employees engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring upon the navigable waterways of the United States or certain adjoining areas, resulting in disability or death. With limited exceptions, the Act provides the exclusive remedy for such injuries against maritime employers which have secured the payment of benefits. See 33 U.S.C. § 905(a).

PROCEDURAL HISTORY[1]

The claimant filed his claim on or about November 26, 2001. The claimant seeks benefits for an alleged binaural hearing loss as a result of exposure to toxic noise while employed at the respondent's Robena Preparation Plant from 1970 through 2002. On September 26, 2002, the Director, Office of Workers' Compensation Programs (OWCP), referred this case to the Office of Administrative Law Judges (OALJ) for a hearing. The case was assigned to me on November 15, 2002.

A formal hearing was held before the undersigned on March 13, 2003, in Pittsburgh, Pennsylvania, at which the parties were given a full and fair opportunity to present evidence and argument. No appearance was entered for the Director, Office of Workers' Compensation Programs ("OWCP"). Claimant's Exhibits (CX) 1- 29 and Employer's Exhibits (EX) 1-11 were admitted to the record without objection. The record was held open for submission of additional evidence. EX 12 (Dr. Arriaga's March 19, 2003 report) and EX 13 (Dr. Arriaga's April 16, 2003 deposition) were subsequently submitted with no objections and are admitted. CX 30 was submitted with no objection and is admitted. The record remained open post hearing for the submission of closing briefs, in June 2003.

I. STIPULATIONS[2]

The parties stipulated (ALJ EX I) and I find:

A. The claimant and the employer were in an employee-employer relationship at the relevant times.

B. The claimant alleged he sustained an hearing loss injuries on or about: May 19, 2000; October 31, 2001; and, July 5, 2003.

C. The injuries, if established, occurred in the course and scope of the claimant's employment

D The claimant was employed by Consolidation Coal Company at the Robena Preparation Plant facility at the time of his alleged work-related injuries and had been employed as a "dockman" from February 22, 1988 through April 23, 1989 and as a "mobile equipment operator" from April 24, 1989 through July 5, 2002.

E. The Robena Preparation Plant ceased operations in 2002 and the claimant was laid-off,

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[1] The following references will be used: "TR" for the official hearing transcript; "ALJ EX" for an exhibit offered by this Administrative Law Judge; "CX" for a Claimant's exhibit; "DX" for a Director's exhibit; "IX" for a Carrier's exhibit; and, "EX" for an Employer's exhibit.

[2] The private parties cannot bind the Special Fund absent the Director's agreement to the stipulations. *Brady v. J. Young & Co.*, 17 BRBS 46 (1985), *aff'd on recon.*, 18 BRBS 167 (1985) *cited with approval in Gupton v. Newport News Ship Building and Dry Dock*, 33 BRBS 94 (1999). Stipulations affecting the Special Fund may be accepted if there is evidence of record to support them. *Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000)(proper to accept stipulation involving non-party) *citing McDougal v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in part sub. nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT)((9th Cir. 1993).

effective July 6, 2002, and thus retired from Consolidation Coal Company at that time.

F. The claimant's last day of work for the employer was July 5, 2002 and he has not worked since that time.

G. The claimant has not missed any work as a result of the alleged work injuries..

H. The claimant's average weekly wage ("AWW") is $ 1,538.00 resulting in the maximum compensation rate of $ 933.82 with respect to the May 19, 2000 injury; while the maximum compensation rate as of 2001 to the present is $ 966.08. (TR 6).

I. The Monongahela River is part of the navigable waters of the United States. (TR 8).

II. ISSUES

A. Whether the Longshore and Harbor Workers' Compensation Act applies to this claim?

B. Whether the claimant sustained work-related injuries, i.e., binaural hearing loss?

C. Whether the claimant provided timely notice to the employer of his workers' compensation claim? 33 U.S.C. § 912.

D. Whether the claimant timely filed his claim? 33 U.S.C.A. § 913(a).

E. Whether the claimant is entitled to past and future medical treatment, pursuant to 33 U.S.C. § 907 in connection with his occupational hearing loss claim?

F. Whether the maximum compensation rate as of 2001 to the present, $ 966.08, applies?

G. Whether the claimant is entitled to interest, under Section 16(e)? (28 U.S.C. § 1961 rate) (TR 7).

III. FINDINGS OF FACT

A. BACKGROUND

The claimant is 66 years old, has a high school education and is a resident of Fayette County, Pennsylvania. (TR 23, 27). He began working for the employer in 1988, in 1989 as a mobile equipment operator, and did so until his retirement on July 5, 2002. (TR 86). From February 22,1988-April 23, 1989, he had worked as a dockman there. (TR 34; CX 12 and 13). Before working for this employer, he had worked as a truck driver in the U.S. Army, a crane operator at Xaloy Fabrication Plant, a lumber company yardman and driver, a roof bolter at the Robena mine employed by U.S. Steel ("USS"), and a mobile equipment operator, from 1970-1982. (TR 29-31). He had been laid off in 1982 and was subsequently hired as a dockman after the employer purchased Robena, in 1988. However, he performed no dockman

duties since being hired as a mobile equipment operator, in 1989. (TR 84). As a roof bolter (1969-1970), he had worked among jack-hammers daily and often had a ringing in his ears after leaving work. (TR 33). He has not worked since his retirement. (TR 35).

B. CLAIMANT'S EVIDENCE

Testimony

Mrs. Lovis, the claimant's wife, testified that she had noticed her husband's hearing problems in 1987 when he received his first set of hearing aides. (TR 23). He could not hear her when she called him and he could not hear the telephone ringing or television. (TR 24). She must face her husband directly when speaking to him or he will not hear her. (TR 25). Mr. Lovis had complained of ringing in his ears when he came home from work. (TR 25).

When the steel barges banged together at Robena, an extremely loud noise resulted. (TR 37). Mr. Lovis was exposed to these noises as a dockman, 1988-1989. (CX 13). The engines of the TEREX and scrapers Mr. Lovis operated at Consolidation were very loud. He always wore ear protection, which the employer provided for some time. (TR 52). In addition to the TEREX noise, he was exposed to noise from the vibrating feeders (at the River tipple), and sledgehammers used to maintain the loading apparatus. (TR 56). Both he and his wife testified his hearing loss has gotten worse since 1987.

Outside of work, Mr. Lovis was not exposed to a great deal of noise. He does not fire weapons or regularly use loud tools at home. (TR 58). He always uses earplugs when operating loud machinery, such as lawn mowers or saws. (TR 58). Presently, Mr. Lovis must watch peoples' mouths when they are speaking, must turn-up the television and radio to high volumes to hear them. (TR 69). Hearing loss does not run in his family. (TR 69).

Mr. Lovis got his first hearing aid from Miracle Ear, in 1987. (TR 65; CX 7). Another audiogram was administered in January 2000 at the United Mine Workers' Building (CX 9) and he was told to see Dr. Oliverio because of his poor hearing. (TR 65). He was examined by Dr. Bell in October 2001.

Physician Opinions

Dr. Anthony Oliverio examined Mr. Lovis, on or about April 3, 2000 (CX 15) and an audiogram was administered then. In his May 19, 2000 report, Dr. Oliverio opined Mr. Lovis sustained a 30.62% binaural hearing impairment secondary to occupational noise exposure. (CX 15). Dr. Oliverio is Board certified by the American Board of Otolaryngology. (CX 28). There is no evidence that this audiogram met all the regulatory criteria.

Dr. Bell examined Mr. Lovis on October 31, 2002 and administered an audiogram then. (CX 16). He is Board certified by the American Board of Otolaryngology. (CX 27). Dr. Bell took a complete and thorough history from Mr. Lovis regarding noise exposure and conducted a complete physical examination. (CX 16). Certified audiologist, Kimberly Jeletic, conducted an audiometric evaluation. (CX 16). The percentage of hearing impairment revealed was calculated using AMA Guidelines, 5th Edition,

showing a binaural hearing impairment of 32.813%. (CX 16). Dr. Bell opined the claimant has been exposed "to sufficient industrial noise to constitute an occupational noise hazard." (CX 16). He added, "based on the history, physical examination, and audiometric test results that Mr. Lovis has suffered the above noted hearing loss is secondary to his cumulative exposure to loud noise during all of his employment at the above noted mining companies." (CX 16).

Dr. Bell examined Mr. Lovis again, on February 7, 2003, and administered another audiogram. The Board-certified audiologist conducting the examination was Catherine Mitchell. In his February 7, 2003 report, he found a 36.25 binaural impairment, representing a hearing loss progression of 3% from the October 21, 2001 audiogram. In his supplemental report, of February 27, 2003, he opined his job as a MEO exposed him to toxic noise and that he did not believe his exposure to gun fire, while in the military, in 1950's, was a significant factor in his present hearing loss. (CX 18). He added, "I certainly believe that the exposure to noise at Consolidation Coal Co. is the single most important contributing factor to his present sensorineural hearing loss, and that motorcycle riding and lawn equipment noise exposure plays no significant part in his present sensorineural hearing loss." (CX 18). Moreover, Dr. Bell found the audiograms of Drs. Arriaga, Oliverio, and his own reliable. He found Mr. Lovis' loss could have progressed between the April 2000 audiogram and the February 2003 audiogram as he had continued to work until July 2002. Finally, he concluded the hearing loss post-1987 at Consolidation was greater than 10%. (CX 17).

Other

The employer, complying with MSHA noise regulations, notified its employees, in September 2000, that based on recent evaluations, individuals working s MBEs or in the river tipple area and the barge unloader area, were either potentially over exposed to the permissible noise exposure limit or were, in fact over exposed. (CX 26).

C. EMPLOYER'S MEDICAL EVIDENCE

Physician Opinions

Dr. Moises A. Arriaga is an extremely well-qualified expert board-certified in Otolaryngology by the American Board of Otolaryngology. (EX 3). He is an associate professor of surgery and otolaryngology and is very well published in his field. (EX 3). He examined the claimant on June 25, 2001, including diagnostic testing, and submitted a report, dated June 27, 2001. (EX 2, 13). He did not send the report to Mr. Lovis. (EX 13 at 24). Dr. Arriaga summarized the claimant's injury, history of treatment, and current complaints of hearing loss. His April 2003 deposition testimony reflected a comprehensive grasp of the claimant's medical and employment history. Dr. Arriaga also reviewed the claimant's medical records since the injuries. A physical and an audiogram, by a state certified audiologist, Natalie Dormer, as well as a review and summarization of all the medical evidence was conducted by Dr. Arriaga.

Using the AMA Guidelines, 4th Edition (1993), Dr. Arriaga found a 39.4% right ear monaural impairment and a 45% left ear monaural impairment, which yields a 40.3% binaural impairment. (EX 2).

Dr. Arriaga noted that the July 31, 1987 audiogram showed a 20.63% binaural impairment. The April 3, 2000, audiogram showed a 30.63 % binaural impairment. He concluded that the impairment Mr. Lovis suffered prior to his employment with Consolidation could not be attributed to it. Thus, exposure at Consolidation would be only a 10% binaural impairment (30.63%- 20.63%). During that time his principal "added risk" for the development of hearing loss was exposure to lawn equipment noise. Admittedly, some of Mr. Lovis' hearing loss (about 10% binaural) was attributable to noise exposure at Consolidation. (EX 13 at 24-25).

On March 19, 2003, Dr. Arriaga wrote that he and Dr. Oliverio were essentially in agreement that the latter's February 7, 2003, audiogram results were the most accurate indicator of the claimant's best hearing ability. (EX 13 at p. 15-16). He added, there "is no definitive evidence of hearing loss progression." (EX 12). The difference between the 2003 audiogram and his June 25, 2001 audiogram merely represented an "anomaly" in testing. (EX 13 at 20). He agreed Dr. Oliverio's 20.63% binaural hearing loss finding, in 1987, would be the appropriate impairment to use as a preexisting loss prior to employment with Consolidation. (EX 12; EX 13 at 16). On cross-examination, he admitted there had been some, i.e., "not . . . that much", hearing loss progression between 1987 and the more recent tests. (EX 13 at 23).

The employer's March 26, 1987 audiogram was conducted by technician D. Wiley and reviewed by Dr. Stanley Falor, whose credentials are not in the record. (EX 4). This was Mr. Lovis first audiogram. He reported a "bilateral conversational hearing loss" and "moderate higher frequency hearing loss." Mr. Lovis had noted occasional hearing difficulty at the time but that his hearing was "fair" and he could hear conversation in a crowd. He also reported he had worn ear protection and that the noise had been intermittent.

Mr. Lovis State hearing loss claim was withdrawn. (EX 10).

D. JURISDICTIONAL AND COVERAGE FACTS

At Robena, a coal preparation and processing plant along the Monongahela River, in Green County, Pennsylvania, "raw" coal comes in from the (off-site) Dillworth Mine, is unloaded from barges at the riverside barge unloader (CX 20), conveyed to the top of a nearby 10,000-ton raw coal silo (about 50 yards from the river) to await processing, leaves the silo at the bottom by belt and is conveyed to the transfer building from where it was conveyed to the preparation plant to be "washed" or cleaned of any slate or refuse it contains and "sized". (TR 36-37, 87-88, 107; EX 1).[3] The slate refuse goes out the back to the refuse silo. (TR 37). The "clean" coal then leaves the preparation plant and is conveyed through the transfer building and either is conveyed on belts to be loaded into barges at the river tipple or conveyed by belts to be dumped in trucks and taken to be stockpiled on the premises if there is not enough room on the barges. (TR 39; CX 20). CX 19 and CX 20 show the clean coal storage (hand-drawn circle) and reclaim site. (TR 39). Mr. Lovis' duties did not include taking clean coal dumped into trucks from the conveyor

[3] CX 19, is a diagram of the plant illustrating the conveyor belts, tipple, buildings, storage and (un)loading facilities. CX 1 is a vidoe-taped tour of the facility narrated by Mr. Lovis at the hearing. (TR 71-81). Robena had previously been a coal mine itself, but was closed when Consolidation bought the facility. (TR 106).

and blue chute to the clean coal stockpile to be stored. (TR 80-81). According to former plant superintendent Smith, the (clean coal) stock pile was the equivalent of a warehouse. (TR 116). Mr. Lovis' duties included picking up coal with his TEREX from the stockpile of clean coal, take it to the D-stock hopper and dump it in the grizzly bars. (TR 41; CX 22-04). Mr. Lovis testified he dumped the coal through the grizzly bars. (TR 75).

"Stoker" coal or fine coal, was not sent directly to the barges, but was also stored nearby on the plant premises, apart from the other clean coal. (TR 39-40; CX 22-02 and 03; CX 24). When the stored stoker or fine coal was ready to be loaded on barges, a huge TEREX machine (earthmover)(CX 22), operated by a mobile equipment operator ("MEO"), i.e., Mr. Lovis, scoops up the stoker coal, and transports it to the D-stock hopper and drops through the grizzly bars to the conveyor and transported by a belt conveyer system by which the barges are loaded. (TR 127).

As a MEO, Mr. Lovis worked his TEREX at the stored clean coal stockpile, from where he hauled it to the D-stock area. He also, as part of his regular duties, picked up or scooped up the stoker coal and hauled it to the D-stock pile.[4] (TR 44). From there (the D-stock pile) the coal is placed in the D-stock hopper either by Mr. Lovis (EX 1; TR 133) or by another worker utilizing different equipment from where it falls through the hopper's grizzly bars (CX 21) onto a conveyor belt (D-stock belt-CX 21) and is sent to the transfer house via the conveyor belt and then either the preparation plant or the river tipple (belt 85) (if clean coal) for loading into barges. (TR 45, 48-49, 51-52). (CX 23 video depicts the process with Mr. Lovis driving the TEREX). Loading coal into the D-stock hopper (from where it fell onto the conveyor belt through the hopper's grizzly bars) was <u>not</u> part of Mr. Lovis' daily activities. (TR 49-50; CX 47). When he was not (occasionally) hauling coal to the D-stock belt, "most of the time", according to his boss, Mr. Smith, he was hauling slate from the refuse pile or "load-out silo" to and around Pond 4, two miles from the river, or "up the hill", a mountain of slate refuse one and one-half miles from the river. (TR 44-45, 49, 91-92, 110, 115, 118). The stockpile was not used in 2000, but Mr. Lovis worked hauling the waste slate. (TR 115). The slate was a refuse by-product of the coal processing. The parties do not dispute Pond #4's lack of maritime nexus. (TR 45).

Mr. Lovis first noticed a hearing problem in 1987 when he got a hearing aid. He had audiograms on July 31, 1987 and January 28, 1991. However, he testified he never got a copies of the examinations. His signature is on page 10 CX 14, the 3/26/87 audiogram. He did get a copy of Dr. Oliverio's examination of April 3, 2000 (CX 15), from his lawyer. He filed a state worker's compensation claim, on May 26, 2000, claiming benefits for a work-related hearing loss. He also got copies of Dr. Bell's report with audiogram of October 31, 2001, in November 2001, from his lawyer. More than a year later, i.e., November 26 and November 27, 2001, he filed his federal claims for hearing loss.

IV. CONCLUSIONS OF LAW

An injured person must satisfy four elements in order to receive compensation under the LHWCA. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 45 110 S.Ct. 381, 107 L.Ed.2d 278, 23 BRBS

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[4] Mr. Lovis testified "sometimes I'd spend the whole day there (the stockpile). . . [I]f they needed me there. . ." (TR 93). Mr. Smith testified that Mr. Lovis was not at the stockpile every day. (TR 128).

96(CRT) (1989). First, the person must be injured in the course of employment. 33 U.S.C. § 902(2). Next, the employer must have employees engaged in maritime employment. 33 U.S.C. § 902(4). Third, the injured person must have "status," that is, be engaged in maritime employment. 33 U.S.C. § 902(3); *Director, OWCP v. Perini N. River Assocs.*, 459 U.S. 297, 317, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). Finally, the injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a). This last element is the "situs" test. *E.g., Schwalb*493 U.S. at 45.

It is well established that, in arriving at his or her decision, an Administrative Law Judge is entitled to evaluate the credibility of all witnesses and to draw his or her own inferences and conclusions from the evidence. *Quinones v. H.B. Zachery, Inc.* 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998). Accordingly, the Administrative Law Judge's credibility determinations will not be disturbed unless they are inherently incredible or patently unreasonable. *Id.; Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

It has been consistently held that the Act must be construed liberally in favor of claimants. *Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L. Ed. 5 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

A. JURISDICTION[5]

A party seeking benefits under the Act has the burden of establishing jurisdiction. *Director, OWCP, v. Greenwich Collieries*, 114 S.Ct. 2251 (1994), *aff'g* 990 F.2d 730 (3d Cir. 1993). In order for a claimant to be eligible for benefits ("coverage" or personal jurisdiction under the Act), the LHWCA, as it was amended in 1972, required an injured worker to qualify under both a "situs" and a "status" test. *Pfeiffer Co. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed 2d 225, 11 BRBS 320 (1979).

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[5] The law of the Circuit in which injury occurs, i.e. the Third Circuit here, is applicable. *Roberts v. Custom Ship Interiors*, ___ BRBS ____ (May 15, 2001)(BRB No. 00-832). The Board, the Fifth Circuit, and Ninth Circuit have distinguished "jurisdiction" from "coverage" of the Act. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 90 (1989); *Munguia v. Chevron USA, Inc.*, 999 F.2d 808, 27 BRBS 103, (CRT) (5th Cir. 1993), *cert. den.*, 511 U.S. 1086 (1994); and *Perkins v. Marine Terminals, Corp.*, 673 F.2d 1097, 1100 (9th Cir. 1982), *rev'g* 12 BRBS 219 (1980)("Situs" question goes only to "coverage" not subject matter jurisdiction); *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353 (9th Cir. 1981).

The Benefits Review Board ("BRB") has consistently held that the Section 20(a) presumption (one of "causation") does not apply to "coverage." *Sedmak v. Perini N. River Associates*, 9 BRBS 378 (1978), *aff'd sub. nom. Fusco v. Perini N. River Associates*, 622 F.2d 1111 (2d Cir. 1980), *cert. den.* 449 U.S. 1131 (1981); *Watkins v. Newport News Shipbuilding and Dry Dock Co.*, 36 BRBS 21 (2002)(Courts have held the Section 920(a) presumption is not applicable to the legal interpretation of the Act's coverage provisions). Some courts find it does apply. *See, Saipan Stevedore Co., Inc. v. Director, OWCP*, 133 F.3d 717, 723 (1997); *Edgerton v. Washington Metropolitan Area Transit Authority*, 925 F.2d 422, 423 (D.C. Cir. 1991)(per curiam).

"Subject matter" jurisdiction is the court's authority to hear a claim pursuant to Congressional authority. In *Sasse v. U.S. Department of Justice*, ARB No. 99-053 (ARB August 31, 2000), the Administrative Review Board, US DOL, observed that a court has subject matter jurisdiction when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the paper writing invoking the court's action is not obviously frivolous. (Citations omitted). Subject matter jurisdiction is not at issue. See also, Hillsman, John R., "*Looking for a Lodestar Among the Rocks of Longshore Coverage*", U. OF SAN FRANCISCO MARITIME LAW JOURNAL (Summer 1991)("Coverage" versus "jurisdiction").

Prior to the 1972 amendments to the Act, a worker injured upon navigable waters of the United States was covered by the Act without any inquiry into what he was doing at the time of his injury. A longshore or harbor worker injured on the landward side of the dock, however, could not collect LHWCA benefits and was thus left with state workers' compensation benefits as his sole remedy. The 1972 Amendment added the "status" test, an "occupational" requirement, extending LHWCA coverage to "maritime employees" who perform their duties on land areas adjoining navigable waters. See 33 U.S.C. § 902(3). The Amendments thus broadened the geographic requirement. *Nelson v. American Dredging Co.*, 143 F.3d 789, 795 (3rd Cir. 1998). Maritime "employers" were also defined. See 33 U.S.C. § 902(3).

Maritime workers are thus permitted to collect benefits under the LHWCA, even if they are injured on land, so long as they meet the following tests:

> (1) Status - the worker must be a maritime "employee", such as a longshoreman, shipbuilder, or ship repairman engaged in loading, unloading, constructing, or repairing a vessel of at least eighteen net tons in size. *See* 33 U.S.C. § 902(3); 20 C.F.R. § 702.301(12).
> (2) Situs - the worker's injury must occur on navigable waters of the United States, or on a coterminous dry dock, pier, wharf, terminal, building way, marine railway "or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel."[6] *See* 33 U.S.C. § 903(a).[7]

In 1983, the Supreme Court held that Congress had not intended to withdraw any coverage when it passed the 1972 amendment, which added the "status" requirement and expanded the "situs" definition. Therefore, any worker injured on navigable waters could claim under the LHWCA regardless of whether he or she met the statute's "status" requirement of being a "maritime employee."[8] *Director, OWCP v. Perini N. River Assoc.*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465, [15 BRBS 62(CRT)](1983); *see also Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999)(*en banc*). Thus, if a worker is injured on a navigable water situs, he or she need only show that he or she works for a maritime employer in order to be eligible for LHWCA benefits.

If the same worker is injured, instead, on an adjoining dock, pier, wharf, dry dock or loading area, he or she must also prove that his or her particular job is of a "traditionally maritime" status, or connected to ship-loading[9], ship building, ship repairing, etc., to claim LHWCA eligibility. *See Texports Stevedore*

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[6] The Third Circuit's "situs" test, articulated in *Sea-Land Service v. Director, OWCP*, 540 F.2d 629 (3rd Cir. 1976) was discredited in *Northeast Marine Terminals Co. Inc., v. Caputo*, 432 U.S. 249, 264-65 (1977).

[7] *Nelson v. American Dredging Co.*, 143 F.3d 789, 32 BRBS 115(CRT)(3d Cir. 1998). "[T]he scope of 'maritime employment' [remains] . . . imprecise." Citing *Sea-Land Service, Inc., v. Rock*, 953 F.2d 56 (3rd Cir. 1992) at 60 (citing 33 U.S.C. section 902(3)).

[8] The Board has held that a threshold requirement of the navigability inquiry is the presence of an "interstate nexus" in order for the body of water in question to function as a continuous highway for commerce between ports. *Morrissey v. Kiewit-Atkinson-Kenny, et al.*, 36 BRBS 5 (2002) *citing LePore v. Petro Concrete Structures, Inc*., 23 BRBS 403, 406 (1990).

[9] See *Bianco v. Georgia Pacific Corp.*, 35 BRBS 99 (2001) *aff'd*, 36 BRBS 57(CRT)(11th Circuit 2002) and *generally Garmon v. Aluminum Co. of America-Mobile Works*, 28 BRBS 46, 49 n. 2 (1994), *aff'd on recon.*, 29BRBS 15 (1995)(regarding "unloading." The non- covered bulldozer operator's job (arranging piles) in the aluminum ore storage

Co. v. Winchester, 554 F.2d 245, 6 BRBS 265, *aff'd on reh'g en banc*, 632 F.2d 504, [12 BRBS 719] (5th Cir. 1980)*(en banc), cert. den.* 452 U.S. 905 (1981)("adjoining area" should focus on functional relationship or nexus between "adjoining area" and maritime activity on navigable waters); *Olson v. Healy Tibbits Construction Co.*, 22 BRBS 221 (1989); *Arjona v Interport Maintenance Co., Inc*., 31 BRBS 86 (1997); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141, 7 BRBS 409 (9th Cir. 1978)(four-factor test); and, *Waugh v. Matt's Enterprises, Inc*., ___ BRBS ___, BRB No. 98-0735 (Feb. 23, 1999)(applies *Brady-Hamilton* functional relationship test).[10] An adjoining area must have a maritime use, but need not be used exclusively or primarily for maritime purposes. *Texports, supra*; *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) at 4; *Bianco v. Georgia Pacific Corp*., 35 BRBS 99 (2001). The Board determines coverage (situs), under section3(a), by the nature of the place at the moment of injury. *Charles v. Universal Ogden Services, et al*, 37 BRBS 37 (2003)(arising in 5th Circuit) *citing Stroup v. Bayou Steel Corp*., 32 BRBS 151 (1998) and *Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992).

An "area" is not limited to the pin-point site of the injury; rather determination of whether an area is a covered situs requires an examination of both the site of the injury and the surrounding area, and the character of surrounding properties is but one factor to be considered. *Bianco v. Georgia Pacific Corp*., 35 BRBS 99 (2001) *aff'd*, 36 BRBS 57(CRT)(11th Circuit 2002).[11] Both the Benefits Review Board (BRB) and the courts have held that "adjoining areas" need not be contiguous to navigable waters, nor a prescribed distance from the water's edge.[12] *See Palmer Delta Marine Industries*, 12 BRBS 957 (1980); *Texports, supra*, and *Zeringue v. McDermott, Inc*., 32 BRBS 75, BRB No. 98-435 (Dec. 8, 1998)(sites "customarily used for significant maritime purposes").[13] But *see McCormick v. Newport News Ship*

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building began after other employees had completed its unloading and delivered it there.)

[10] The tests are: (1) the particular suitability of the site for maritime purposes; (2) whether adjoining properties are devoted primarily to use in maritime commerce; (3) proximity to the waterway; and, (4) whether the site is as close to the waterway as feasible given all the circumstances of the case. *Brady-Hamilton Stevedore Co., supra*. *See also Sowers v. Metro Machine Corp*., 35 BRBS 154 (2001), __ BRBS ___, (BRB No. 00-1141)(Jan. 3, 2002)(*en banc*)(facility used to fabricate vessel components failed to meet "situs" requirement despite fact ship repair was its *raison d'etre*) for discussion of Fourth Circuit's *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT)(4th Cir. 1998), *cert. den*., 525 U.S. 1040 (1998)(contiguity of steel fabrication plant (1/3d fabricating steel for maritime use) with dock to navigable waters only fortuitous thus situs test not met).

[11] "Situs" test not met where gypsum products plant was not an "adjoining area", under Act, and not an area used exclusively for maritime purposes or activities of loading, unloading, building, or repairing ships, despite fact parts adjoined navigable waters. The perimeter of an "area" is defined by function and that area must be one customarily used by an employer in loading, unloading, repairing, or building a vessel. *Bianco* at 60, *citing Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980)(*en banc*) at 515. In *Charles v. Universal Ogden Services*, 37 BRBS 37 (BRB No. 02-0511)(April 17, 2003), a food storage warehouse was not considered an "adjoining area" where its location had no functional relationship to the Miss. River, was too far from the Gulf coast docks to be considered part of that area and, functioned as a warehouse from which trucks, not vessels, were loaded. In *Dickerson v. Missippi Phosphates Corp.*, 37 BRBS 58 (BRB No. 02-0547)(April 29, 2003), a fertilizer plant (not connected by conveyor belts) with a dock 100 feet from the waters edge (which received the unfinished product) was not a covered situs where it was not one listed in Section 3(a) and lacked a maritime use.

[12] *See, Arjona v. Interport Maintenance Co., Inc.*, 31 BRBS 86 (BRB No. 99-0573)(Mar. 1, 2000) for a review of the law in this area. *See also Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (BRB No. 00-583)(February 13, 2001).

[13] *See, Uresti v. Port Container Industries, Inc*., 34 BRBS 127 (BRB No. 99-432)(Aug. 21, 2000)*aff'g on recon.*, 33 BRBS 215 (1999)(arising in 5th Cir.)(Regarding "customary use". Covered situs found for warehouse storing maritime cargo after it was unloaded and before it entered stream of land transportation). *See also, Nixson v. Mobile Mining & Minerals*, ___

Building and Dry Dock Co., 32 BRBS 207 (1998)(arising in 4th Cir.) and *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134 (4th Cir. 1995) *cert. den.* 518 U.S. 1028, 116 S.Ct. 2570, 135 L.Ed.2d 1086 (1996)(an area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters and it must be a discrete structure or facility, the very *raison d'etre* of which is its use in connection with navigable waters like the section 3(a) listed areas). The Third Circuit, disagreeing with *Sidwell*, does not so limit the definition of "area" to structures like the ones listed. *Nelson v. American Dredging Co.*, 143 F.3d 789, 795 (3rd Cir. 1998).

Under the "status" test of Section 2(3), coverage under the LHWCA is restricted to those "engaged in maritime employment." The "status" test is independent of the "situs" test. *McCray Construction Co. v. Director, OWCP*, 181 F.3d 1008, 33 BRBS 81 (CRT)(9th Cir. 1999). This test is satisfied if the claimant's duties are "an integral part" of the longshoring, shipbuilding or ship repair process.[14] *Northeast Marine Terminals v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2d 320, [6 BRBS 150] (1977). The courts are required to look beyond the claimant's job title since it is the function and nature of the duties which determine status. *Caputo, supra; Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 [5 BRBS 393] (3d Cir. 1977); *Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (BRB No. 00-0928B)(July 11, 2001)(Examine nature of the work not the employer's name, i.e., a casino). "First, the work must be 'maritime' for the person to be an 'employee." *McCray*, 33 BRBS at 83.[15] In order for one's job to meet the status test, the duties for the employer must be a "necessary link in the chain of work that resulted in ships being built and repaired." *Graziano v. General Dynamics*, 663 F.2d 340 [14 BRBS 52] (1st Cir.

F.3d ___ (Case No. 99-60273)(5th Cir., Feb. 7, 2000), *aff'g* BRB No. 98-988 (March 2, 1999), *pet. for cert. filed*, No. 00-44 (July 6, 2000). *See Jones v. Aluminum Co. of America [Jones II]*, 35 BRBS 37 (2001), *citing Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998), for discussion of the "function", i.e., the loading, unloading, repairing or building of vessels, of the adjoining area. *See Nelson, supra*, in Third Circuit. *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999)(Covered employee working in building, near navigable waters connected by conveyor belts to loading area, where finished fertilizer products stored to await further transhipment by vessel met "situs" test).

[14] So, in *Kilburn v. Colonial Sugars*, 32 BRBS 3 (1998), the claimant's momentary or incidental maritime work outside the normal course of his non-maritime job was insufficient to confer status. Although an employee is covered if some portion of his activities constitute covered employment, those activities must be more than episodic, momentary or incidental to non-maritime work.. *Riggio v. Maher Terminals, Inc.*, 35 BRBS 104 (2001) citing *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. den.*, 452 U.S. 915 (1981) and *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101(CRT)(11th Cir. 1990). In *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002), the Board affirmed the judge's findings that the claimant's work changing air conditioning filters in the employer's shipyard was "integral" to the operation of those shops where ship building work was performed. The Board noted the "support services" rationale raised by the employer had been previously rejected as a test for coverage.

[15] See *Chesapeake & Ohio Ry. Co. v. Schwalb*, 439 U.S. 40, 46, 110 S.Ct. 381, 107 L.Ed.2d 278, 23 BRBS 96(CRT)(1989) and *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56 at 67, 25 BRBS 112 (CRT)(3d Cir. 1992) at 121, for definition of "maritime". See *Moon v. Tidewater Construction Co.*, 35 BRBS 151 (2001) at 152-3 (carpenter lacked status) and *Lloyd v. RAM Industries, Inc.*, 35 BRBS 143 (2001) at 147 n. 6, for definition of "harbor worker," i.e., "at least those persons directly involved in the construction, repair, alteration, maintenance, of harbor facilities (which include docks, piers, wharves, and adjacent areas used in the loading, unloading, repair or construction of ships." *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2002)(Shipyard machine shop cleaner had status as maritime employee since his work was integral to the shipbuilding and repair process). See 33 U.S.C. § 902(4) for definition of "employer." *Dickerson v. Missippi Phosphates Corp.*, 37 BRBS 58 (BRB No. 02-0547)(April 29, 2003)(worker in chemical plant manufacturing fertilizers who never loaded or unloaded vessel nor maintain equipment to do so lacked status). In *Buck v. General Dynamics Corp/Electric Boat Corp.*, 37 BRBS 53 (BRB No. 02-0534)(April 24, 2003) & *Rondeau v. General Dynamics Corp/Electric Boat Corp.*, 37 BRBS 53 (BRB No. 02-0535)(April 24, 2003)(worker's compensation claims administrators found to lack status).

1981), *rev'g* 13 BRBS 16 (1980); *Jackson v. Atlantic Container*, 15 BRBS 473 (1983).

The Supreme Court has also held that coverage extends to workers, who although not actually loading and unloading vessels, are involved in the intermediate steps of moving cargo between ship and land transportation. *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 62 L. Ed. 2d 225, 100 S.Ct. 328 [11 BRBS 320] (1979); *see also Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, [23 BRBS 96(CRT)] (1989)(maritime employment includes employees "on the situs involved in the essential or integral elements of the loading or unloading process.")[16]; *Gonzalez v. Merchants Building Maintenance*, ___ BRBS ___, BRB No. 98-1633 (Sept. 21, 1999)(*Schwalb* test not met); and, *McKenzie v. Crowley American Transport, Inc.*, 36 BRBS 41 (BRB No. 01-0565)(April 3, 2002)(A trucker whose primary job was moving cargo, in containers and trailers, between a holding area at the port and a rail yard outside the port was not covered).

A maritime employee claimant need not be actually engaged in maritime employment at the time of the relevant injury. *Caputo, supra*. Since *Caputo*, it is well settled that an employee who regularly performs duties relating to maritime employment should not be denied coverage if injured while temporarily performing some non-maritime activity. *Ljubic v. United Food Processors*, 30 BRBS 143 (1996); *Maher Terminals, Inc. v. Director, OWCP*, __ F.3d ___, (3d Cir. No. 01-3343, May 29, 2003)(Look at claimant's regular duties, notwithstanding he was working an excluded job the day of injury). The Board has held that an employee satisfies the status requirement if he spends "a [*sic*] substantial part of his employment in indisputably maritime activity."[17] *Howard v. Rebel Well Service*, 11 BRBS 568 (1979) *rev'd*, 632 F.2d 1348, [12 BRBS 734] (5th Cir. 1980); *Riggio v. Maher Terminals*, 35 BRBS 104, (BRB No. 00-960)(June 28, 2001)(discussion of occupational focus of claimant's overall employment versus defunct "moment of injury" theory). *See also McKenzie v. Crowley American Transport, Inc.*, 36 BRBS 41 (2002)("Although an employee is covered if some portion of his activities constitute covered employment, those activities must be more than episodic, momentary or incidental to non-maritime work.")(Emphasis added); *Bienvenu v. Texaco, Inc.*, 164 F.3d. 901, 32 BRBS 217(CRT)(5th Cir. 1999)(*en banc*)(not an "insubstantial amount" of one's work on navigable waters) *overruling Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994).[18] *But see contra McCray Construction Co. v. Director, OWCP*, ___F.3d ___, 33 BRBS 81 (CRT)(9th Cir. 1999)(Relying on *Harbor Tug & Barge v. Papai*, 520 U.S. 548, 117 S.Ct. 1535, 137 L.Ed 800 (1997), the Court held a claimant lacked status when although a lifetime maritime worker he was not performing maritime work at the time of his injury, but rather working on a pier not used to serve ships).

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[16] In *Watkins v. Newport News Shipbuilding and Dry Dock Co.*, 36 BRBS 21 (2002) at 23, the Board found error in the judge's failure to draw the "inference" mandated by *Schwalb*, that is that the claimant's failure to do her job would lead to an eventual shut down of the loading process or impede the shipbuilding process. *See also Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 67 (3rd Cir. 1992). In *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2002) at 55, the Board observed, "In *Schwalb*, the Supreme Court stated, 'It is irrelevant that an employee's contribution to the loading process is not continuous or that repair or maintenance is not always needed.'"

[17] In *McGoey v. Chiquita Brands International*, 30 BRBS 237 (1997), the Board upheld status coverage for a worker who spent 3-5 percent of his time in a covered activity, *citing Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993).

[18] *Christensen v. Georgia Pacific Corp*., ___ F.3d ___ (No. 00-35922)(9th Cir. Feb. 1, 2002)(Coverage does not depend upon the task which the employee was performing at the moment of injury).

As this claim arises within the jurisdiction of the Third Circuit, it is necessary to examine the existing law in that Circuit. The United States Circuit Court, Third Circuit (hereinafter "Third Circuit") has detailed the history and purpose of the 1972 Amendments thoroughly in *Sea-Land Service Inc. v. Rock*, 953 F.2d 56 (3rd Cir. 1992). In doing so, the Third Circuit has offered considerable guidance on the reach of coverage afforded by the Act. In *Rock*, the Court found that the claimant was not entitled to coverage under the Act because "Rock's work was simply too far remote from the chain of events directly leading to the loading of cargo." *Id.* at 66.

> The claimant in *Rock* was employed as the driver of a "courtesy van" that was used primarily within the employer's '200-acre container loading and unloading terminal.' *Id.* at 59. The vans which Rock operated were used for the transportation of 'executives, visitors, seamen, ship's crewmen, clerical workers, customs officials, and customers.' *Id*. Any longshoreman employed at the employer's facility were transported via alternate means for which Rock had no responsibility. *Id*. Rock was also not responsible for transporting any cargo and did not repair or maintain any equipment. *Id.*

Rock injured his knee stepping out of his van while in the course of his employment. *Id.* In determining whether Rock was entitled to coverage under the Act, the Third Circuit reviewed the purpose behind the 1972 Amendments to the Act as well as the Supreme Court's interpretation of those Amendments. According to the Court, the 1972 Amendments instituted a two-part test to determine coverage under the Act. *Id*. at 60. The Third Circuit went on to reiterate legislative history: "[t]he Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable water used for such activity." *Id. citing* H.R. Rep. No. 92-1441, 92d Cong. 2d Sess. 11 (1972). However, the 1972 Amendments left the scope of marine employment "imprecise." *Id*.

> The Third Circuit observed:
>
> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered for part of their activity. To take a typical example, cargo, whether in break or bulk or containerized form, is typically unloaded from the ship and <u>immediately</u> transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area ... [E]mployees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. . .

Id. at 60-61 citing H.R. Rep. No. 92-1441, 92d Cong. 2d Sess. 10-11 (1972).[19] The Third Circuit went on

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[19] Also cited extensively in *Northeast Marine Terminals v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2d 320, [6 BRBS 150] (1977). There, the Court, in referring to the example, wrote,"The example clearly indicates an intent to cover those workers involved in the essential elements of unloading a vessel taking cargo out of the hold, <u>moving it away from the ship's side, and carrying it immediately to a storage or holding area</u>. . . Thus, employees such as truck drivers, whose responsibility on the waterfront is essentially to pickup or deliver cargo unloaded from or destined for maritime transportation are not covered . . . while the example is useful for identifying the outer bounds of who is clearly excluded and who is clearly

to state that the example offered by the Committee illustrated that marine employment "must have some nexus to the loading and unloading of cargo," however, the example was not meant to be all inclusive. *Id*. at 61.

The Third Circuit further discussed the Supreme Court's interpretation of the 1972 Amendments. The Third Circuit explained that the Supreme Court has determined the 1972 Amendments are to be liberally construed because this construction [will] "fulfill the purpose of the Act by generously covering those who were formerly subject to the shifting compensation schemes and those who are involved in the loading and unloading process, but who previously may not have been covered because of their wholly land-based functions. But neither the Court nor Congress intended to expand coverage to those wholly uninvolved with ship-building or loading or unloading cargo." *Id*. at 61.

The Third Circuit quoted the Supreme Court's observation concerning the "status" test that:

> [In enacting the maritime employment requirement,] Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading: it is 'clear that persons who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered.' While "marine employment" is not limited to the occupations specifically mentioned in § 2(3), neither can it be read to eliminate any requirement of a connection with the loading or construction of ships. As we have said, the 'maritime employment' requirement is 'an occupational test that focuses on loading and unloading.' The Amendments were not meant 'to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.' We have never read 'maritime employment' to extend so far beyond those actually involved in moving cargo between ship and land transportation.

Id. at 62-63 citing *Herb's Welding*, 470 U.S. 416, 423-24, 105 S.Ct. At 1427-28 (1985)(The welder's work, on a non-covered off-shore drilling rig, had nothing to do with loading or unloading).

The Third Circuit has interpreted this holding in *Herb's Welding* to be the outer limits of coverage under the Act. *Id*. at 63. The Third Circuit went on to discuss the Supreme Court's holding in *Schwalb*. "In *Schwalb*, the (Supreme) Court, upheld coverage under the Act for 'janitorial' employees. . . who are (were) "injured while maintaining or repairing equipment essential to the loading or unloading process. . ." *Id*. at 63 citing *Schwalb*, 493 U.S. at 47. The Supreme Court went on to hold that "[t]he determinative consideration is that the ship loading process could not continue unless the retarder that [the employee] worked on was operating properly." *Id*. at 63 *citing Schwalb*, 493 U.S. at 48.

The Third Circuit has held that to determine eligibility for coverage under the Act, an "integral

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included, it does not speak to all situations. In particular, it is silent on the question of coverage for those people. . . who are injured while on the situs . . . and engaged in the handling of cargo as it moves between sea and land transportation after its immediate unloading." (Emphasis added).

part" or "necessary ingredient" test should be employed. *Id*. at 64, citing *Dravo Corp. v. Banks*, 567 F.2d. 593 (3rd Cir. 1977)(Concerning a shipbuilder's unskilled laborer). Additionally, the Third Circuit "require(s) some nexus between the employee's activities and either cargo-handling or shipbuilding, the primary functions of the major areas of occupation listed in section 902(3)." *Id*. at 65. In *Rock*, the Third Circuit found that the process the cargo undergoes would be "completely unaffected" if Rock's position was eliminated. *Id*. at 67. The Third Circuit went on to explain that "[l]and-based activity occurring within the section 903 situs, other than those activities explicitly listed in section 902(3), should be deemed maritime only if it is an integral or essential part of the chain of events leading up to the loading, unloading, or building of a vessel." *Id*. at 67.

Both parties have referred to *Maher Terminals v. OWCP [Riggio]*, 330 F.3d 162 (3d Cir. 2003)(hereinafter "*Maher"*) and *Maraney v. Consolidation Coal Co.*, BRB No. 02-0661 (June 19, 2003). Significantly, *Maraney* involves the same Robena Plant owned by Consolidation and one of Mr. Lovis former co-workers, who also worked as a mobile equipment operator, among other duties. Like Mr. Lovis, Mr. Maraney actually dumped coal through the D-stock hopper from which it fell on to the conveyor belt which took it to the transfer house from where it was conveyed to empty barges. However, in affirming the Administrative Law Judge's dismissal for lack of jurisdiction, the Board did not focus on the work at the D-stock hopper as he claimed injury at Pond #4, miles away from that area.

In the *Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58 (BRB No. 02-0547) (April 29, 2003)(hereinafter "*Dickerson")* case, involving situs and status, the claimant fell off of a ladder while welding in employer's phosphoric acid plant located about 100 feet from the water's edge. Employer's chemical plant manufactured fertilizer and is on a navigable waterway. The plant: takes in phosphoric rock by vessel, converts it into sulfuric acid, then phosphoric acid, and then the phosphoric acid is made into a fertilizer. The fertilizer leaves the plant by rail, truck or barge. The claimant described his job as requiring him to weld pipe and operate forklifts, cherry pickers, and front end loaders. His supervisor stated that the claimant's work required him to perform a lot of steel fabrication work, some expansion work in the plant, some pipefitting, and foundation work for machinery. The claimant conceded that he never loaded or unloaded vessels, and did not maintain or repair any equipment used in the loading or unloading of a vessel. For two weeks during his employment, the claimant did remove wood pilings from the water's edge.

The *Dickerson* Board affirmed the ALJ's finding that the piling removal work was not covered employment as there was no evidence establishing that the removing of the pilings from the water's edge was related to the loading, unloading, building, or repairing of a vessel, or to building or repairing a harbor facility used for such activity. Moreover, the Board found that the case was distinguishable from other cases involving "covered" employees working in loading operations at fertilizer plants, as the claimant's work was not integral to loading and unloading. Thus, the Board upheld the ALJ's determination that the claimant was not an employee covered under the LHWCA. Turning to situs, the Board determined that the ALJ had correctly found that there was not a covered situs. The Board noted that for coverage, one must look to the nature of the place of work at the moment of injury and that to be considered a covered situs, a landward site must be either one of the sites specifically enumerated in Section 3(a) or an adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel. The Board noted that an "adjoining area" must therefore have a maritime use. It upheld the ALJ''s

determination that this phosphoric acid plant was solely used in the fertilizer manufacturing process and had no relation to any customary maritime activity. The Board further rejected the claimant's contention that his injury occurred on a covered situs merely because employer's entire facility abuts navigable waters and has a dock area on the property. The Board noted prior case law distinguishing a plant from its docks when a worker worked solely in the plant.

In the present case, the Monongahela River is connected to the Ohio River and indisputably constitutes "navigable" water. *Maraney v. Consolidation Coal Co.*, BRB No. 02-0661 (June 19, 2003)(hereinafter "*Maraney*"). However, the claimant here was not injured upon or in the water. It is established the employer here is a "maritime" employer.

The unpowered barges used to transport coal to and from Robena qualify as "vessels", under the Act. In *Martinez v. Signature Seafoods Inc.; Lucky Buck F/V, et al*, ___ F.3d. ___, No. 01-35768 (9th Cir. September 11, 2002), the Court held that a seaworthy fish processing barge that was towed across navigable waters twice a year can qualify as a "vessel in navigation" for certain purposes of the Jones Act. The Court distinguished the case from *Kathriner v. Unisea*, 975 F.2d 657 (9th Cir. 1992)(Floating fish processing plant permanently anchored to dock and not moved in seven years). In *Uzdavines v. Weeks Marine, Inc.*, 37 BRBS 40 (BRB No. 02-0512)(April 18, 2003), the BRB affirmed judge's finding that a barge used to dredge navigational channels (either towed by a tug or moving on spuds) was a vessel in navigation. (*See also Tonnesen v. Yonkers Contracting Co., Inc.*, 82 F.3d 30 (2d Cir. 1996)).

The fact that the Robena Plant abuts navigable waters and has docks for the loading and unloading is not alone determinative of jurisdiction here. Nor does the fact that the processing plant itself lacks any traditional maritime function preclude a finding of jurisdiction. Mr. Lovis did not work in the preparation plant. The fact that the claimant was, at all times he claimed injury, i.e., between May 2000 and July 2002, solely a land-based worker driving a type of dump truck/scooper, i.e., a TEREX, does not preclude a finding of jurisdiction. *See, Caputo, supra*. One must look beyond his job title. The fact his injuries occurred while driving the TEREX during both solely non-maritime activities and during the loading process does not require denial of his claim. *See, Pfeiffer, infra.* Nor does the fact the D-stockpile may have served as a type of "warehouse" preclude jurisdiction. *See, Pfeiffer Co. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed 2d 225, 11 BRBS 320 (1979).

While the *raison d'etre* of the Preparation Plant was cleaning, sizing and separating coal, the *raison d'etre* of the entire Robena facility and its siting on the river permitted Consolidation to easily transport by water and process huge amounts of coal taken from its mines and subsequently transport clean coal to its customers. There was no evidence that any means other than river traffic was used to transport the raw coal in or the clean coal out of the facility. The evidence does not show any facilities immediately adjoining Robena devoted to maritime activities. However, Robena is nearly perfectly sited for the shipment of large quantities of coal by barge. Given the circumstances, it is as close to the river as feasible. Nor can one say its location was merely "fortuitous."

The fact Robena was not used exclusively or primarily for maritime uses does not preclude a finding it is a covered "adjoining area. As the court noted in *Bianco, supra,* the perimeter of an adjoining area is defined by function and must be one "customarily used by the employer" in loading and unloading.

Here, the D-stock hopper is such an area. Unlike the fertilizer plant, in *Dickerson, supra*, not connected by conveyor belts with a dock 100 feet from the water's edge, the D-stock hopper was connected to the coal delivery point, on the river, by conveyor belts. Mr. Dickerson was injured in the fertilizer plant, unlike Mr. Lovis who was injured driving the TEREX outside the plant. Moreover, unlike Mr. Lovis, Mr. Dickerson had not participated in loading or unloading. There is little, if any, distinction between the claimant here and the covered fertilizer storage building employee, in *Gavranovic, supra*, who met the situs test. Like the warehouse in *Uresti, supra*, the D-stockpile was a facility to store maritime cargo, i.e., the clean coal, before it entered the stream of maritime transportation. Mr. Lovis participated in moving cargo between the warehouse (D-stockpile) and ship (empty barges). Thus, his work greatly differed from the non-covered trucker, in *McKenzie, supra*.

The claimant was unquestionably not involved in unloading coal, in any manner. However, when he dropped the clean coal, which he had scooped up in his TEREX from the D-stockpile, through the grizzly bars from which it fell on to the D-stock conveyor belt to be moved through the transfer building to the tipple and river front where it was loaded into the waiting empty barges, he was performing a duty integral and essential to the loading process. It is true that this was not his full time duty and that some days he did not perform this task. Likewise, he did not do so in 2000 at all.[20] His most usual function was to haul the refuse slate away from the preparation plant and deliver it to Pond #4 or the hill top, both over a mile from the river. However, only he and one other TEREX driver was assigned to move both the stoker coal and the clean coal from the D-stockpile to the D-stock hopper. Moreover, the claimant's D-stockpile work was more than merely momentary or incidental. Judging from the photos and videos in evidence showing the huge size of the D-stockpile during Robena's operations and after its closure and comparing the minuscule size of the TEREX by it, the MEOs had a great deal of work to do there.

While clean coal still could have been conveyed from the preparation plant directly to the waiting empty barges without Mr. Lovis' participation, the employer on occasion admittedly either lacked customers to ship coal too or lacked a sufficient number of empty barges to hold and transport the coal. The clean coal had to be stored somewhere; that place was the D-stockpile. While Mr. Lovis did not put it there, he did remove it and enter it into the delivery process. Without a TEREX operator, such as the claimant, Consolidation would not have gotten the stored clean coal (or the stoker coal) into the transportation and delivery stream.

The fact Consolidation did not remove coal from the D-stockpile every day does not defeat jurisdiction. The fact some of the D-stockpile was occasionally used to "juice up" other categories of coal is of little import since it was primarily used as a storage pile. The fact the D-stockpile was a type of storage or warehouse facility is of little consequence. The materials loaded by any longshoreman must come from somewhere, whether it is a warehouse, another vessel, or land-transportation. There is no requirement that the D-stockpile be an actual building or warehouse. Moreover, the D-stock hopper area was one "customarily used by the employer in loading" the clean coal, under the view of the Third Circuit.

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[20] *Herb's Welding*, 470 U.S. 416, 423-24, 105 S.Ct. At 1427-28 (1985), suggests that the claimant's entire tenure with the employer be considered, i.e., here his prior work as a dockman, 1988-1989. *But see, Maher Terminals v. OWCP [Riggio]*, 330 F.3d 162 (3d Cir. 2003)*(Caputo* "shifting coverage" aspect did not apply, as in the present case).

Unlike the dozer operator in *Garmon, supra*, Mr. Lovis did not merely rearrange piles of coal, but actually entered it into the shipment process.

I find the claimant has established the maritime employment nexus to the loading of cargo required by the Third Circuit, in *Rock, supra*. Unlike the van driver in *Rock*, the cargo, i.e., coal, here would not be "completely unaffected" if Mr. Lovis' position had been eliminated. Mr. Lovis' has established his work was essential and integral to the chain of events leading up to and including loading of the cargo.

Given that Mr. Lovis is a maritime employee, I find the Employer qualifies as a maritime employer. 33 U.S.C. section 902(4). Thus, I find coverage (jurisdiction), under the Act.[21]

Although I find the claimant meets both status and situs tests and has established jurisdiction or coverage under the Act, under the law of the Third Circuit, I observe that in spite of not too infrequent attempts by the Supreme Court to clarify such jurisdictional issues, the law, as developed by the various Circuits and the Board is, not surprisingly, a hodgepodge of complex holdings.[22] With the 1972 Amendments, Congress surely expanded the Act's coverage to encompass certain land-based "maritime" workers, recognizing the changing waterfront procedures. The lower courts have taken the Supreme Court's admonition encouraging an expansive construction of the extended coverage up to and perhaps beyond what Congress may have intended.[23] It is difficult to fathom how dump truck operators hauling coal around Robena who drop coal onto a conveyor which ends up in a barge or a mechanic changing air conditioner filters, a machine shop cleaner, or mechanics, qualify as longshoreman or harbor workers.

The Supreme Court did not ignore the Congressional Committee language, set forth above, stating that coverage extended to workers involved in unloading a vessel "taking cargo out of the hold", moving it away from the "ship's side", and carrying it immediately to storage. In *Caputo, supra*, the Court observed that, "The Act focuses primarily on occupations, longshoremen, harbor worker, ship repairman, shipbuilder, shipbreaker. . . And demonstrates a desire to provide continuous coverage throughout their employment to <u>these amphibious workers</u> who without the 1972 Amendments, would be covered for only part of their activity." (Emphasis added). If the Court's observation above was more closely followed, only the Robena workers <u>directly</u> unloading coal from the barges at the barge unloader and only those directly loading it at the barge loadout would qualify, but not those operating loading equipment inland who dropped cargo onto a system of conveyor belts which eventually took it to waiting barges.

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[21] Had the barge loadout and bins site been the area where the clean coal was "warehoused", perhaps the result would differ. However, that was not the evidence.

[22] In *Caputo, supra*, the Court observed that the Third Circuit "appears to have essentially discarded the situs test, holding that only '(an) employment nexus (status) with maritime activity is (necessary)' and that the situs of the maritime employment at the time of the injury is irrelevant." Citing *Sea-Land Service v. Director, OWCP*,552 F.2d 985 (3rd Cir. 1977) and *Farrell, supra*. See also, Hillsman, John R., "*Looking for a Lodestar Among the Rocks of Longshore Coverage*", U. OF SAN FRANCISCO MARITIME LAW JOURNAL (Summer 1991)(Referring to the vague statutory language, the seven Supreme Court coverage cases, and other opinions murking the waters.

[23] See, Hillsman, John R., "*Looking for a Lodestar Among the Rocks of Longshore Coverage*", U. OF SAN FRANCISCO MARITIME LAW JOURNAL (Summer 1991)(Referring to *Coloma v. Director, OWCP*, 897 F.2d 394, 399 n. 2 (9th Cir.)(Which stated "the Supreme Court views 'expansive notions' of what is maritime 'with disfavor.')

RESPONSIBLE EMPLOYER

For a claim to be compensable, under the Act, the injury must arise out of and in the course of employment. 33 U.S.C. § 902(2). Therefore, an employer-employee relationship must exist at the time of the injury. *American Stevedoring Limited v. Marinelli*, ___ F.3d ___, No. 00-4180, 35 BRBS 41(CRT)(2d Cir. 2001) *citing Fitzgerald v. Stevedoring Services of America*, BRB No. 00-0724, 2001 WL 94757, at 4 (2001)(*en banc*). The claimant and the employer here were admittedly in an employee-employer relationship at the relevant times. Since the claimant's disabling injuries occurred while he was employed by Consolidation the named employer is the responsible employer.

Occupational Diseases[24]

Apportionment of liability, in occupational disease cases, among competing employers is not permitted, under the Act. *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 1 BRBS 509 (1975), *aff'd in part and rev'd in part*, 539 F.2d 234, 10 BRBS 614 (3d Cir. 1979); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1285, 16 BRBS 13, 18 (CRT)(9th Cir. 1983), *cert. den.*, 466 U.S. 937 (1984).

The employer, as a self-insurer, is the party responsible for payment of benefits under the rule stated in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo*, 350 U.S. 913 (1955).[25] Under the judicially created[26] "last employer" rule of *Cardillo*, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the

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[24] Occupational disease is not defined in the Act. Courts have defined it as "any disease arising out of exposure to harmful conditions of employment, when those conditions are present in peculiar or increased degree by comparison with employment generally." *Gencarelle v. General Dynamics Corp*., 892 F.2d 173, 176, 23 BRBS 13 (CRT)(2nd Cir. 1989). An occupational disease includes "some physical harm, i.e., that something has gone wrong with the human frame." *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). It does **not** include hearing loss. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 113 S.Ct. 692 (1993). Repetitive motion and cumulative trauma injuries are not occupational diseases. *Gencarelle v. General Dynamics Corp*., 23 BRBS 13 (CRT)(2nd Cir. 1989), *but see Morgan v. Ingalls Shipbuilding , Inc*., BRB Nos. 95-2152 and 95-2152A (Feb. 4, 1997)(carpal tunnel considered an occupational disease)(The BRB, finds repetitive trauma injuries to be occupational diseases whereas the 1st, 2nd, and 5th Circuits say it is a traumatic injury. See BRBS Commentary, Pub. 610, Release 610, May 2001). The Ninth Circuit adopted the *Gencarelle* definition of "occupational disease" in *Port of Portland, Helmsman Northwest v. Director, OWCP*, 33 BRBS 143(CRT)(9th Cir. 1999). *See Foundation Constructors v. Director*, OWCP, 950 F.2d 621, 623-24 (9th Cir. 1991)(cumulative/repetitive injury not an "occupational disease.")

[25] In *Bath Iron Works v. Brown*, 33 BRBS 162(CRT) (1st Cir. 1999), the court explained the "last employer" rule is concerned with the allocation of liability among employers and not with the question of compensability. It is based upon the assumption that "all employers will be the last employer a proportionate share of the time." *Cordero v. Triple A. Machine Shop*, 580 F.2d 1331 at 1336.

[26] *New Orleans Stevedores, et al v. Ibos*, 36 BRBS 93(CRT) at 99, 317 F.3d 480 (5th Cir. 2003)(Jones dissenting) *citing Avondale Industries, Inc.*, 977 F.2d at 190. The majority finds the rule was gleaned as a matter of legislative interpretation of Congressional intent.

award.[27] *Cardillo*, 225 F.2d at 145. *See Cordero v. Triple A. Machine Shop*, 580 F.2d 1331 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *General Dynamics Corporation v. Benefits Review Board*, 565 F.2d 208 (2d Cir. 1977); *Norfolk Shipbuilding and Dry Dock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000)(No. 99-1755)(Sept. 25, 2000)(no requirement for certain level of exposure to injurious stimuli) *pet. for cert.*, No. 00-576 (2000); *Newport News Shipbuilding & Dry Dock Co. v. Stilley*, 243 F.3d 179, No. 00-1155, 35 BRBS 12 (CRT) (4th Cir. March 12, 2001); *New Orleans Stevedores v. Ibos*, (No. 01-60480)(Jan. 16, 2003), 317 F.3d.480, 36 BRBS 93(CRT) (5th Cir. 2003); and, *Ibos v. New Orleans Stevedores*, 35 BRBS 50 (May 9, 2001)(BRB Nos. 00-828 and 00-828A)(Claimant had no subsequent employer, thus BRB held latter could establish it was not the responsible employer only by establishing asbestos exposure while working for it did not have the *potential* to cause the mesothelioma), ___ F.3d ___, 36 BRBS 93(CRT)(5th Cir. 2003). Later exposure to injurious stimuli during non-covered work does not absolve the covered employer of liability. *Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000) at 100 *citing Fulks v. Avondale Shipyards, Inc*., 637 F.2d 1008, 12 BRBS 975 (5th Cir. 1981), *cert. den*. 454 U.S. 1080 (1981).[28]

A claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. *Tisdale v. Owens Corning Fiber Glass Co.*, 13 BRBS 167 (1981), *aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor*, 698 F.2d 1233 (9th Cir. 1982), *cert. denied*, 462 U.S. 1106, 103 S.Ct. 2454 (1983); *Whitlock v. Lockheed Shipbuilding & Construction Co.*, 12 BRBS 91 (1980). The Board has held the *Cardillo* "last exposure" rule does not require a showing of an actual medical causal relationship between the claimant's exposure and his occupational disease. *Franklin v. Dillingham Ship Repair*, 18 BRBS 198 (1986).

For purposes of determining who is the responsible employer or carrier, the "awareness" component of the *Cardillo* test is identical to the "awareness" requirement of Section 12 (notice of injury). *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985).[29]

In *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991), the United States Court of Appeals for the Ninth Circuit reviewed the issue of the responsible employer in a hearing loss case under *Cardillo* and *Cordero* and held the employer at the time of the audiogram which

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[27] *Cardillo*'s "last employer" rule is applicable only to occupational disease cases. *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 623 (9th Cir. 1991); *Steed v. Container Stevedoring Co.*, 25 BRBS 210, 219 (1991); *Rodriguez v. California Stevedore & Ballast Co.*, 16 BRBS 371 (1984). Moreover, *Cardillo* is a rule of liability assessment, not of jurisdiction. *Fulks v. Avondale Shipyards, Inc*., 637 F.2d 1008, 1012, 12 BRBS 975 (5th Cir. 1981) *cert. den* 102 S.Ct. 633.

[28] Thus, in *Stilley v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000) the Board summarily affirmed the Shipyard's liability as the last covered employer notwithstanding the claimant's subsequent exposure to asbestos with a non-covered employer, NASA. *See Stilley*, 243 F.3d 179, 35 BRBS 12 (CRT)(4th Cir. 2001).

[29] In *Bath Iron Works v. Director, OWCP [Hutchins]*,35 BRBS 35(CRT), 244 F.3d 222 (1st Cir. Case No. 00-1208)(April 5, 2001), the Court held the "last carrier" for purposes of disability payments may not be the same as the "last carrier" responsible for medical benefits. The date of disability (in this occupational disease case) rather than the date of awareness of disease, is the key to determining the responsible insurer for disability.

establishes the amount of the compensation liable for benefits.[30] The court also relied on the statement in *Cordero* that there must be a "rational connection" between the onset of the claimant's disability and his exposure; thus, the court held liable the last employer who, by injurious exposure, could have contributed causally to the claimant's disability evidenced on the audiogram that formed the basis of this hearing loss claim.[31] *Port of Portland*, 932 F.2d at 840, 24 BRBS at 143 (CRT). The Board subsequently held, in *Good v. Ingalls Shipbuilding Inc.*, 26 BRBS 159 (1992), that it would follow the decision in *Port of Portland* in hearing loss cases regardless of the circuit in which the case arose.[32]

Although Consolidation vigorously argues that some or all of Mr. Lovis' hearing loss arose while he worked for U.S. Steel, years before he was hired by the former, and the evidence shows that he was indeed subjected to harsh noise in his work then with deleterious results for his hearing, as evidenced by various audiograms, *Port of Portland*, *supra*, and *Good*, *supra*, require I find Consolidation solely liable. Mr. Lovis has firmly established his exposure to harmful noise levels there with the concomitant deleterious results.

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[30] "In occupational disease cases, the last covered employer is liable for the totality of claimant's disability from the occupational disease, regardless of whether it was aggravated by subsequent non-covered employment." *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159, 162 (1991), cited with approval in *Bath Iron Works, et al, v. Brown*, 33 BRBS 162(CRT) (1st Cir. 1999); *Stilley v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000). *See also, Ramey v. Stevedoring Services of America*, 134 F.3d 954, 959 (9th Cir. 1998)(endorsing setting "time of injury" as date of last exposure over date of diagnosis). In *Jones Stevedoring v. Director, OWCP[Taylor]*, 133 F.3d 683, 31 BRBS 178 (CRT)(9th Cir. 1997), the court said *Port of Portland* "does not require a demonstrated medical causal relationship between claimant's exposure and his occupational disease." It approved of the judge's findings based upon the claimant's testimony showing the "potential" for hearing loss injuries at his last maritime employer at the time of his audiogram. *See also, Ramey, supra.*(claimant's uncontradicted testimony sufficient to invoke § 20). *See Maersk Stevedoring Co. v. Container Stevedoring Co.*, 2000 WL 27883, F.3d ___ (9th Cir. Jan. 11, 2000)(Holding employer at time of initial non-compliant audiogram liable when all agreed all audiograms were essentially the same).

[31] The employer has the burden of proof establishing it is not the responsible employer by proving it did not expose the employee to injurious stimuli or that the claimant was so exposed while performing work at a subsequent covered employer. *Everson v. Stevedoring Services*, 1999 WL 816553, *4 (DOL Ben. Rev. Bd. 1999), *citing Ramey v. Stevedoring Services of America*, 134 F.3d 954, 959 (9th Cir. 1998); *Roberts v. Alabama Dry Dock & Shipbuilding Corp*., 30 BRBS 229 (1997); *Faulk*, 228 F.3d at 384, 34 BRBS at75(CRT). However, the Ninth Circuit specifically "reject[s] any reading of *Cardillo* that would impose liability on an employer who could not, even theoretically, have contributed to the causation of the disability." *Port of Portland*, 932 F.2d at 840-841. In *Stevedoring Services of America, et al v. Director, OWCP [Benjamin*], 297 F.3d 797, 36 BRBS 28(CRT)(9th Cir. 2002), the Court found error in the judge's "merger", under the "last-employer" rule, of two distinct hearing loss claims, stating, "[T]he case law does not support the rule that there can be just one 'last employer'."

[32] In *James Benjamin v. Container Stevedoring Co., et al.*, ___ BRBS ___, (BRB Nos. 00-0414 and 00-0414A)(2001), the Director appealed the findings of the ALJ that SSA, a subsequent employer was responsible for Claimant's hearing loss. The Director contended on appeal that the ALJ should have found Container Stevedoring, Claimant's original employer, liable in part based on the level of impairment reflected in the Claimant's first audiogram. The Director argued that because there were two injuries and two audiograms, the ALJ had erred in treating the second audiogram as dispositive and holding only the second employer responsible. SSA, the subsequent employer joined in the appeal supporting Director's contention. The Board, citing *inter alia, Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), affirmed the ALJ. The Board held that because both claims involved hearing loss injuries the ALJ properly treated them as one injury and not two. On that basis, the Board explained, the responsible employer is the employer during the last employment where Claimant is exposed to injurious stimuli. Accordingly, SSA, as the last employer was properly held liable for the entire injury. See 36 BRBS 28(CRT).

I conclude that Consolidation is the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, and is therefore liable for the full amount of the award.

TIMELINESS OF NOTICE

Section 912 sets out the requirements for timely notice to an employer of injury or death. 33 U.S.C. § 912. Generally, an employee has 30 days to provide notice, and the clock starts to run when reasonable diligence would have disclosed the relationship between his injury and his employment. § 912(a); 20 C.F.R. § 702.212(a). Section 920(b) establishes a presumption that sufficient notice of the claim has been given. An employer may rebut the presumption by presenting substantial evidence that it did not have knowledge of the employee's work-related injury or death. *See, Blanding v. Director, OWCP [Oldham Shipping]*, 33 BRBS 114(CRT)(2d Cir. 1999) *citing Stevenson v. Linens of the Week*, 688 F.2d 93, 98 (D.C. Cir. 1982). Failure to give timely notice may bar a claim.

Under 20 C.F.R. § 702.212(a)(3), a claimant has 30 days from employee's injury, i.e., the date of receipt of audiogram and accompanying report indicating employment-related hearing loss, to provide the employer notice.[33] Under § 908(c)(13)(D), the ordinary period is tolled pending receipt of an audiogram with accompanying report. *See* 20 C.F.R. §§ 702.602. The statute of limitations periods in hearing loss cases do not begin to run until the employee is given a copy of the audiogram and the accompanying report. 33 U.S.C. §908(c)(13)(D); *Vaughn v. Ingalls Shipbuilding, Inc.*, 28 BRBS 129 (1994)(*en banc*)(Receipt by counsel not constructive receipt by claimant). Contrary to *Vaughn*, *Jones Stevedoring v. Director, OWCP,[Taylor]*, 133 F.3d 683 (9th Cir. 1997), held claimant's attorneys receipt of an audiogram was "constructive receipt" under §908(c)(13)(D). Thus, absent a holding in the Third Circuit, I must follow *Vaughn*. Thus, the fact Mr. Lovis' counsel received the materials is insignificant.

Mr. Lovis' first audiogram was administered by Dr. Oliverio in 1987, when he needed a hearing aid, and there was apparently no written report. (TR 59). It does not qualify under the regulations. Moreover, even Dr. Arriaga testified the reported results were confusing. (EX 13 at 22). Mr. Lovis testified he had not asked Dr. Oliverio the source of his hearing loss nor did he do so after the 1991 examination. (TR 97). He did note his occasional hearing difficulties on the employer's physical examination form on March 26, 1987. (TR 61, 94). Here, although the claimant had had audiograms conducted prior to his retirement, in order to get hearing aides, he was only once provided a copy of the results, in May 2000, by his earlier attorney, and never received reports. (TR 63-66). That May 19, 2000, audiogram, by Dr. Oliverio, was used for purposes of filing a state workers' compensation claim. It is not established that Mr. Lovis received a copy of the report related to the May 19, 2000 audiogram. On October 31, 2001, he was given another audiogram by Dr. Michael Bell. The first time he received any audiograms or reports from Dr. Bell was through his present lawyer on November 27, 2001. (TR 67). A notification of the injury was then given the employer and a claim for compensation filed. Then, after his

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[33] In *Bath Iron Works v. Director, OWCP*, 113 S.Ct. 692, 698 (1993), the Court held that occupational hearing loss is not a disease that does not immediately result in disability or death. Therefore, under *Bath*, hearing loss would require notice within 30 days. *Jones Stevedoring v. Director, OWCP[Taylor]*, 133 F.3d 683, 31 BRBS 178 (CRT)(9th Cir. 1997).

retirement he was administered yet another audiogram by Dr. Bell, in February 2003. CX 5, a letter from his counsel dated February 25, 2003, is the first time anyone had provided him a copy of Dr. Bell's February 7, 2003 report. (TR 68).

Although the Employer did not receive written notice of the claimant's injury or occupational illness as required by Sections 12(a) and (b), the claim is not barred because the employer had knowledge of the claimant's work-related problems (the pre-employment examination and State claim) or has offered no persuasive evidence to establish it was prejudiced by the lack of written notice. *Sheek v. General Dynamics Corporation*, 18 BRBS 151 (1986) (*Decision and Order on Reconsideration*), *modifying* 18 BRBS 1 (1985); *Derocher v. Crescent Wharf & Warehouse*, 17 BRBS 249 (1985); *Dolowich v. West Side Iron Works*, 17 BRBS 197 (1985); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999)(involving § 30(a)). *See also* Section 12(d)(3)(ii) of the Amended Act and 20 C.F.R. § 702.216. Specifically, Mr. Lovis' occasional difficulty hearing was noted on his pre-employment screening documents, in 1988, when he was hired by the employer. (TR 61). He had also signed a document listing his pre-employment audiogram results which noted "bilateral conversational hearing loss with moderate high frequency loss." (TR 96-97; CX 14). Further notice was provided via the State claim filed in May 2000.

Failure to give timely notice does not bar a claim if the employer was not prejudiced by the delay. Section 912(d)(2). It is the employer's burden to establish prejudice. *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233, 1990 WL 284061, *5 (Ben. Rev. Board 1990). "Prejudice" means merely that the employer's ability to investigate the case has been impaired due to the delay in giving notice. *Jones Stevedoring v. Director, OWCP*, 133 F.3d 683, 31 BRBS 178 (CRT)(9th Cir. 1997). I find the employer has not established that it was prejudiced by the claimant's failure to provide timely notice. In fact, no evidence of prejudice was provided or argued.

I find the employer has submitted not established rebuttal of the presumption, under Section 920(b)**,** that the claimant gave timely notice of his injury.

TIMELINESS OF CLAIM

As a threshold matter, I must consider whether the claimant timely filed his claim. A worker generally must file an LHWCA claim within one year after the injury.[34] 33 U.S.C.A. § 913(a); 20 C.F.R. § 702.221. In a claim for loss of hearing, an employee has one year to file a claim for compensation, and the time for filing a hearing loss claim begins to run when the employee receives an audiogram with an accompanying report indicating the existence of a work-related hearing loss. 33 U.S.C. §§ 908(c)(13)(D), 913(a) (1994); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

It is well-settled that the employer has the burden of establishing that the claim was not timely filed.

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[34] If a claim was timely filed against a later employer, the time limits do not begin to run against a prior employer until the employee is aware or should have been aware that liability could be asserted against that prior employer. *Smith*, 647 F.2d at 524, 13 BRBS at 396. Similarly, if a claim is timely filed against a prior employer, the time limits do not begin to run against a later employer until the employee is aware or should have been aware that liability could be asserted against that later employer. *Osmundsen* v. *Todd Pacific Shipyard*, 18 BRBS 112 (1986) at 115.

33 U.S.C. §920(b); *Fortier v. General Dynamics Corporation*, 15 BRBS 4 (1982), *appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board*, 729 F.2d 1441 (2d Cir. 1983); *Carlisle, supra*.

In the case sub judice, Mr. Lovis testified that it was not until Dr. Bell's examination in October 2001, that he actually received a report. (TR 15). His claim was then filed on November 26 and November 27, 2002. (EX 6 & 7).

Section 30(f) provides that where an employer/carrier has been given notice or the employer (or his agent) or carrier has knowledge of an employee's injury or death and the employer/carrier fails to file a report as required by Section 30(a), the Section 13(a) time limitation period does not begin to run against the claim until the report is filed with the District Director.[35] *See* 20 C.F.R. §702.205; *Maddon v. Western Asbestos Company*, 23 BRBS 55 (1989); *Aurelio v. Louisiana Stevedores*, 22 BRBS 418 (1989); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd* 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989); *Patterson v. Savannah Machine & Shipyard*, 15 BRBS 38 (1982); *Williams v. Washington Post Co.*, 13 BRBS 366 (1981). There is no evidence here concerning the employer's filing of the required report.

Section 13(d) specifies that the one (1) year statute of limitations is tolled by the pendency of a state workers' compensation claim. *Ingalls Shipbuilding Division, Litton Systems, Inc. v. Hollinhead*, 571 F.2d 272 (5th Cir. 1978); *Smith v. Universal Fabricators*, 21 BRBS 83 (1988), *aff'd*, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989); *Calloway v. Zigler Shipyards, Inc.*, 16 BRBS 175 (1984); *Saylor v. Ingalls Shipbuilding*, 9 BRBS 561 (1978); *George v. Lykes Bros.*, 7 BRBS 877 (1978); *McCabe v. Ball Builders, Inc.*, 1 BRBS 290 (1975); *but see Bath Iron Works v. Director, OWCP*, 125 F.3d 18 (1st Cir. 1997)(expressing doubts about 5th Circuit's rule, in dicta). The burden of establishing the elements of Section 13(d) is on the claimant. *George, supra*, at 880. Here, Mr. Lovis filed a state worker's compensation claim on May 26, 2000 which was not resolved until January 24, 2002. (EX10). I find and conclude that Claimant has sustained his burden on this issue. The filing of the claim under the state workers' compensation law constituted a suit for damages within the meaning of Section 13(d) and thus also tolled the Section 13(a) statute of limitations through January 24, 2002.

I find the employer has not met the burden of establishing that the claim was timely filed.

INJURY

Section 2(2) of the LHWCA defines an "injury" as an accidental injury or death arising out of and

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[35] The Second Circuit applies § 930(f) to § 913(b)(2) which merely extends the time to file a claim by one year in occupational disease cases. The time begins when the claimant becomes aware or should have become aware of the relationship between the injury or death and the employment. *Blanding v. Director, OWCP [Oldam]*, 33 BRBS 114(CRT)(2d Cir. 1999). The Court, deferring to the Director, further held, contrary to the Board's holding in *Speedy v. General Dynamics Corp.*, 15 BRBS 352, 355 (1983), that the § 920(b) presumption triggers the § 930(a) reporting requirement. *See also, Stark v. Washington Star Co.*, 833 F.2d 1025, 1028 (D.C. Cir. 1987)(§ 920(b) presumption applies to any proceeding) and *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 1120-21 (5th Cir. 1980)(finding sufficient notice under § 912 based on § 920(b) presumption).

in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. 33 U.S.C. § 902(2)*; see U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor*, 455 U.S. 608, 102 S.Ct. 1312 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980).

The claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish his prima facie case.[36] *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495, [14 BRBS 631](1982); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11 (1998)(claimant need not prove impairment was "work-related" at this juncture only that conditions existed which could have caused it). An injury need not involve an unusual strain or stress; it makes no difference that the injury might have occurred wherever the employee may have been. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Glens Falls Indemnity co. v. Henderson*, 212 F.2d 617 (5th Cir. 1954). The claimant must establish each element of his prima facie case by affirmative proof.[37] *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 2d 221, 28 BRBS 43(CRT)(1994).

Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. *Bath Iron Works Corp. v. White*, 584 F.2d 569 (1st Cir. 1978).

An "occupational" disease has been defined by the courts as "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally."[38] *Carlisle, supra, citing LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 160, 31 BRBS 195, 197 (CRT)(5th Cir. 1997), *quoting Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 176, 23 BRBS 12, 18 (CRT)(2d Cir. 1989); *Port of Portland, Helmsman Northwest v. Director, OWCP*, 33 BRBS 143(CRT)(9th Cir. 1999). In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and

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[36] Or, as the Board stated in *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984), that the claimant has the burden of establishing: (1) he or she sustained physical harm or pain; and, (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. But, a connection between the work and the harm need not be established at this stage. *Accord, Kelaita*, 13 BRBS at 331.

[37] *(For hearing loss claims)* In *Bath Iron Works v. Brown*, 33 BRBS 162 (CRT)(D.C. Cir. 1999), the Court stated it had not set a standard for how much evidence a claimant must show to make out a prima facie case and noted that other circuits were in disagreement. The court did not use the case to establish a standard. *Compare Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 1012 (5th Cir. 1981) *and Brown v. I.T.T./Continental Baking* Co., 921 F.2d 289, 296 n. 6 (D.C. Cir. 1990) *with Todd Pacific Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317, 1320 (9th Cir. 1990).

[38] In *Carlisle* (involving carpel tunnel syndrome), the Board pointed out that the occupational disease "must, at the very least be produced or aggravated by the distinctive conditions or exertions of the employment . . . in essence, (is) the 'peculiar to' employment test utilized . . . in *Gencarelle* and *LeBlanc*."

claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability.[39] *Carlisle, supra; Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955); and, Section 10(i). *Thorud v. Brady-Hamilton Stevedore Company, et al.*, 18 BRBS 232 (1987); *Geisler v. Columbia Asbestos, Inc.*, 14 BRBS 794 (1981); 20 C.F.R. § 702.601. Where there is no evidence of record which establishes that the claimant had any rateable permanent physical impairment or that he was made aware of a permanent condition, the claimant cannot be held to be aware of the relationship between his occupational disease, employment, and disability prior to the date he became disabled. *Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1985); 20 C.F.R. §§ 702.212(b), 702.222(c). A claimant is not aware of the disease until such time as a physician issues a disability or impairment rating. *Carver v. Ingalls Shipbuilding*, 24 BRBS 243, 246-247 (1991).

Once the prima facie case is established, a presumption is created under Section 20(a) of the LHWCA that the employee's injury arose out of his or her employment.[40] 33 U.S.C. § 920(a). Moreover, Section 20(d) of the Act favors the claimant with a presumption that the injury suffered was not occasioned by the willful intention of the injured employee to injure or kill himself or another. *Green v. Atlantic & Gulf Stevedores, Inc.*, 18 BRBS 116 (1986).[41]

Once the presumption is invoked, the party opposing entitlement must present specific and comprehensive medical evidence proving the absence of or severing the (presumed) causal connection between such harm and employment or working conditions.[42] *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *Conoco, Inc. v. Director, OWCP*, 33 BRBS 187, 194 F.3d 684 (CRT)(5th Cir. 1999); *Parsons*

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[39] This occurs for a retiree when the occupational disease causes an impairment rating under the AMA guidelines, i.e., a permanent impairment. 33 U.S.C. § 902(10); 20 C.F.R. § 702.212(b). For non-scheduled claims, under section 8(c)(23), a voluntary retiree may not be charged with such awareness until he knows that a permanent impairment exists. *Lombardi v. General Dynamics Corp.*, 22 BRBS 323 (1989); *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).

[40] This presumption applies only to the issue of whether an injury arises in the course of employment and, thus, is work-related; not to the issues of the nature and extent of disability. *Carlisle v. Bunge Corp.*, 33 BRBS 133, BRB No. 98-1604 (Sept. 13, 1999) *citing Jones v. Genco, Inc.*, 21 BRBS 12 (1998).

[41] *See Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998), regarding the relationship between section 3(c) and the section 20(a) presumption.

[42] In hearing loss claims, to rebut the presumption, an employer must show that "exposure to injurious stimuli did not cause the harm or that the claimant was exposed to injurious stimuli while performing work covered under the [LHWCA] for a subsequent employer." *Avondale Industries Inc., v. Director, OWCP*, 977 F.2d 186, 190 (5th Cir. 1992)(quoting *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986) at 151; *see also General Ship Services v. Director, OWCP*, 938 F.2d 960, 961 (9th Cir. 1991)(applying *Susoeff*). *Susoeff* required a claimant to make a prima facie showing that s/he sustained physical harm and that conditions existed at work which could have caused the harm. The presumption in a hearing loss claim is not rebutted when a doctor indicates it could have been caused by ostiosclerosis, surgery to correct that condition, or noise exposure or some combination thereof. *Bridier v. Alabama Drydock & Shipbuilding Co.*, 29 BRBS 84, 89 (1995). However, the testimony of two doctors may be sufficient to rebut the presumption. *Ranks*, 22 BRBS at 305. (In *Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1996), the employer successfully rebutted the § 20(a) presumption by a physician's unequivocal opinion that the hearing loss resulted from a traumatic fracture.)

Corp. of Cal. v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980).[43] If an employer does not offer substantial evidence to rebut the presumption, the presumption provided by section 20(a) will entitle the claimant to compensation.[44] *See Del Vecchio v. Bowers*, 296 U.S. 280, 284-285, 102 S.Ct. 1312, 71 L.Ed.2d 495 (1935); *Universal Maritime Corp. v. Moore & Director, OWCP*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999).[45]

The employer must rebut the presumption with substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Quinones v. H.B. Zachery*, 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996). Where aggravation of a pre-existing condition is at issue, the employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *Quinones, supra; Cairns v. Matson Terminals*, 21 BRBS 252 (1988); *Zea v. West State, Inc.*, ___ BRBS ___, BRB No. 97-931 (April 9, 1998).[46] In establishing rebuttal of the presumption, however, proof of another agency of causation is not necessary. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982)(Kalaris, J., concurring & dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. den.*, 467 U.S. 1243 (1984). The testimony of a physician that no relationship exists between an injury and the claimant's employment is sufficient to rebut the presumption. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).[47]

If the Administrative Law Judge finds the presumption is rebutted, it no longer controls and he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Devine v. Atlantic Container Lines, G.T.E.*, 25 BRBS 15 (1991). When the evidence as a whole is considered, it is the proponent (claimant) who has the burden of proof. *See, Director, OWCP v. Greenwhich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221, [28 BRBS 43(CRT)(1994).

In the case *sub judice*, the claimant has alleged that the harm to his body, i.e., binaural hearing loss,

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[43] In *Conoco*, the Fifth Circuit held a standard requiring an employer to "rule out" the possibility of a causal relationship between a workplace injury and the claimant's employment was too high a standard to place on employer to rebut the 920(a) presumption. In *American Grain Trimmers, Inc. v. Director, OWCP [Janich]*, __ F.3d ___, 33 BRBS 71(CRT)(7th Cir. 1999), *cert. den.* ___ U.S. ___ (S.Ct. No. 99-696, Feb. 28, 2000), the Seventh Circuit iterated the employer's burden is one of "production" only. In *Ortco Contractors, Inc. v. Charpentier*, ___ F.3d ___ (No. 02-60447)(5th Cir. May 21, 2003), the Court observed the Board has expressed several different formulations of the Act for proving an injury is not work-related, i.e., rule-out, unequivocally state, and affirmatively state, but these all violate its *Conoco* decision.

[44] While "substantial evidence requires 'more than a mere scintilla,' it is only 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 410, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); *see Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982).

[45] In *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995), the Board held even where the record contains no medical evidence establishing causation, the claimant prevails unless the employer submits evidence sufficient to break the causal nexus.

[46] *Zea* also held lay evidence is not sufficient to establish an aggravation.

[47] *But see Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT)(11th Cir. 1990)(which requires "ruling out"the causal connection), for 11th Circuit cases. According to the BRB, the Eleventh Circuit requires a "ruling out" standard, i.e., evidence employment neither caused nor aggravated the harm. *O'Kelley v. Dept. of the Army/NAF*, ___ BRBS ___, BRB No. 99-0810 (May 2, 2000).

resulted from noise exposure at the employer's shipyard. The employer has introduced no evidence severing the connection between the harm and the claimant's maritime employment. Nor has the employer identified a subsequent maritime employer. The evidence concerning Mr. Lovis' minimal use of lawn equipment is both unpersuasive and rebutted. Moreover, a claimant's credible subjective complaints of symptoms, here the hearing loss, and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp*., 14 BRBS 234, 236 (1981), *aff'd sub. nom., Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). Thus, the claimant has established a prima facie claim that the harm suffered is a work-related injury. Moreover, the claimant's audiograms serve as presumptive evidence of his injury. There is little, if any, question here that noise exposure at Consolidation contributed to and caused Mr. Lovis' hearing loss. The employer's experts agree with the claimant's experts about the effect of the noise exposure at Consolidation. It is the degree of loss attributable to that work over which they disagree.

A work-related aggravation of a pre-existing condition is an "injury" pursuant to Section 2(2) of the Act.[48] *Gardner v. Bath Iron Works Corporation*, 11 BRBS 556 (1979), *aff'd sub nom., Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981); *Preziosi v. Controlled Industries*, 22 BRBS 468 (1989); *Janusziewicz v. Sun Shipbuilding and Dry Dock Company*, 22 BRBS 376 (1989) (*Decision and Order on Remand*); *Johnson v. Ingalls Shipbuilding*, 22 BRBS 160 (1989); *Madrid v. Coast Marine Construction*, 22 BRBS 148 (1989).

Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if the employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986)(*en banc*); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998)(hearing loss).

There is no credible evidence that Mr. Lovis was exposed to excessive noise after his Consolidation employment which could have caused or significantly impacted his hearing loss. The employer has not shown that exposure to injurious stimuli did not cause the harm.

I conclude that the claimant has met his burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. The employer has not presented substantial evidence which establishes rebuttal of the presumption, under Section 20(a) that the injury arose out of the claimant's employment.

DISABILITY[49]

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[48] The term "injury" includes the aggravation of a pre-existing non-work-related condition or the combination of work-related and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Care v. WMATA*, 21 BRBS 248 (1988).

[49] See 20 C.F.R. § 702.601 for occupational diseases occurring after retirement.

Section 2(10) of the LHWCA defines "disability" as the incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10); *see also, Metro Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 127 (1997). In order for a claimant to receive disability benefits, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Services of America*, 25 B.R.B.S. 100, 110 (1991); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Owens v. Traynor*, 274 F. Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. *American Mutual Insurance Company of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (*Id*. at 1266).

The claimant bears the initial burden of establishing the nature and extent of any disability sustained as a result of a work-related injury without the benefit of the Section 20 presumption. *Lombardi v. Universal Maritime Service*, 32 BRBS 83 (1998); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); and, *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once the claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Air America v. Director*, 597 F.2d 773 (1st Cir. 1979); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984).

1. EXTENT OF DISABILITY - TOTAL vs. PARTIAL

A claimant has the burden of proving a *prima facie* case of total disability by showing he cannot return to his regular employment due to a work-related injury. *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). At the initial stage, a claimant need not establish he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988)(due to permanent restrictions against heavy lifting and excessive bending, employee could not resume usual job as sandblaster).

Hearing Loss

Under 20 C.F.R. § 702.441, for hearing loss claims after September 28, 1984, an audiogram is presumptive evidence of the extent of the hearing loss, as of the date it is administered, if it meets the three listed criteria, i.e., that it was administered by the appropriate professional, the employee was provided the audiogram and report within thirty days, and, no contrary audiogram of equal probative value is produced

within established time frames.[50] Evaluations of hearing loss are to be made according to the formula contained in the most recent edition of the *AMA Guides to the Evaluation of Permanent Impairment*. 20 C.F.R. § 702.441(d).[51] That is the case here; i.e., that two audiograms, October 31, 2001 and February 7, 2003, constitute "presumptive" audiograms meeting the three regulatory criteria and not being rebutted within the required time parameters. 20 C.F.R. § 702.441. The 1987, Jan. 28, 1991, April 3, 2000 and June 2001 audiograms fail the criteria. Moreover, even Dr. Arriaga testified the 1987 reported results were confusing. (EX 13 at 22).

In the case of a voluntary retiree with hearing loss who did not work after his exposure with the employer, such as the claimant here, the Board held in *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991) at 162, that the holdings in *Bath Iron Works Corp. v. Brown [Brown III]*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999) and *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981) do not necessarily require claimants to recreate the precise extent of their hearing loss at the date the covered employment ended and that, in the absence of credible evidence regarding the extent of hearing loss at the end of the covered employment, the judge may rely on the most credible evidence of record in determining the extent of the claimant's hearing loss. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (July 17, 2001).

The October 31, 2001, audiogram showed a 32.18% binaural loss. (CX 16). The February 7, 2003 audiogram showed a 36.25% binaural loss. (CX 17). The claimant stopped working on July 6, 2002. Dr. Oliverio found an occupational hearing loss progression between 1987 and his 2000 examination and testing. While Dr. Arriaga admitted to Mr. Lovis' hearing loss progression, between 1987 and 2001, he testified that it was unlikely, had Mr. Lovis continued to be exposed to occupational noise between the October 2001 examination and his retirement, because occupational noise causes its principal damage in the first 10-15 years and thereafter slows down dramatically or stops. (EX 13 at 25). Dr. Oliverio opined the occupational hearing loss was progressive. (CX 15). Dr. Bell wrote that given Mr. Lovis continued working and suffered occupational noise exposure after Dr. Oliverio's April 3, 2000 audiogram, his loss "could have" progressed secondary to occupational noise exposure. (CX 18).

Based upon the fact that Mr. Lovis' audiogram results generally showed progressive binaural hearing loss while working, 20.63% (1987), 30.62% (2000), 40.3% (June 2001), 32.81% (October 2001), 36.25% (Feb. 2003), it may be logical to conclude the last audiogram results reflected a continuation in that progression. The evidence also establishes that, although Dr. Arriaga found the claimant's non-occupational exposure was an "additive factor" he did not quantify it, and the greatest contribution to hearing loss occurred at Mr. Lovis' workplace. However, given that Dr. Arriaga is the best qualified physician rendering an opinion and given his more definitive testimony concerning the period between October 2001 and July 2002, I average the results of the last three audiograms (but not the 6/25/01 anomaly) to reach a finding of a 33.23% binaural hearing loss.

Suitable Alternate Employment

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[50] *Craig, et al, v. Avondale Industries, Inc.*, 36 BRBS 65 (2002) *citing Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001) for proposition that ALJ may give less weight to audiograms that do not meet the "presumptive evidence" standard.

[51] According to the *AMA Guides*, a result of 25 decibels (dB) or less indicates normal hearing levels.

When a claimant's retirement is "voluntary" and not due to his injury, the employer is not required to show the continued availability of suitable alternative employment as any loss of wage earning capacity was not due to injury. *Hoffman v. Newport News Shipbuilding and Dry Dock Co.*, 35 BRBS 148 (BRB No. 00-1133)(Aug. 22, 2001)(Where claimant had accepted an early retirement package pertaining to all workers of a certain age). Here the claimant retired when the employer's operation shut down.

2. NATURE OF DISABILITY - PERMANENT vs. TEMPORARY

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *General Dynamics Corporation v. Benefits Review Board*, 565 F.2d 208 (2d Cir. 1977); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding and Construction Company*, 17 BRBS 56 (1985); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984).

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." An injured worker's impairment may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of "maximum medical improvement" or "MMI." *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *see SGS Control Services v. Director, OWCP*, 86 F.3d 438, 443-44 (5th Cir. 1996); *Director, OWCP, v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1991). Any disability before reaching MMI would be temporary in nature. *Id*.

The determination of when maximum medical improvement is reached, so that a claimant's disability may be said to be "permanent," is primarily a question of fact based on medical evidence. *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988); *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); *Eckley v. Fibrex and Shipping Company*, 21 BRBS 120 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

An Administrative Law Judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. *Thompson v. Quinton Engineers*, 14 BRBS 395, 401 (1985). In the absence of any other relevant evidence, the judge may use the date the claim was filed. *Whyte v. General Dynamics Corp.*, 8 BRBS 706, 708 (1978).

The Board has held that an irreversible medical condition is permanent *per se*. *Drake v. General Dynamics Corp.*, 11 BRBS 288 (1979). Here, there is no evidence that the claimant's hearing loss is anything other than irreversible and thus permanent.

On the basis of the totality of the record, I find and conclude that the claimant reached maximum medical improvement on October 31, 2001, the date of his first "presumptive" audiogram and that he has been permanently and partially disabled from that date.

3. CONCLUSIONS REGARDING NATURE & EXTENT OF DISABILITY

In conclusion, based on the credible testimony of the claimant, and fully supported by the medical opinions of the Board certified audiologists, I find that the claimant is entitled to permanent partial[52] disability benefits.

MEDICAL EXPENSES AND BENEFITS

Section 7(a) of the LHWCA provides that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a); *see also* 20 C.F.R. § 702.401. In order for a claimant to receive medical expenses, his injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). If an employer is found to be liable for the payment of compensation pursuant to an award of disability, it follows, in accordance with Section 7(a), that the employer is likewise liable for medical expenses incurred as a result of the claimant's injury. *Perez v. Sea-Land Servs, Inc.*, 8 BRBS 130, 140 (1978).[53] In *Weikert v. Universal Maritime Service Corp*., 36 BRBS 38 (No. 01-552)(Mar. 21, 2002), the Board held the requirements of section 8 of the Act do not apply to a claim for medical benefits, under section 7; a claimant need not have a minimum level of hearing loss (i.e., a ratable loss under the AMA Guides) to be entitled to medical benefits.

Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.,* 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores,* 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.,* 7 BRBS 234 (1977).

Section 7(d) requires that an attending physician file the appropriate report of injury or treatment within ten days of the first examination or treatment. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred.[54] *Betz v. Arthur Snowden Company,* 14 BRBS 805 (1981). *See also* 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. *Roger's Terminal,*

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[52] One with a scheduled injury is presumed to be disabled even though the injury does not actually affect his earnings. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (July 17, 2001) citing *Bath Iron Works Corp*., 506 U.S. 153, 113 S.Ct. 692, 121 L.Ed.2d 619, 26 BRBS 151(CRT). In contrast, for non-schedule injuries, loss of wage-earning capacity is an element of the claimant's case.

[53] *See Shriver v. General Dynamics Corp*., 34 BRBS 370(ALJ)(2000) for an exhaustive list of medical expenses the appellate courts and the Board have approved and disapproved. *See Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 75 (1997) where the Board reversed prior decisions to hold interest may be assessed on past-due sums for medical services whether the costs were initially borne by the claimant or the providers. In *Plappert v. Marine Corps. Exchange*, 31 BRBS 13 (1997), the Board found the employer entitled to a hearing over "contested" medical expenses. In *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996), the Board ruled there is no section 20(a) presumption concerning such bills.

[54] In *Krohn v. Ingalls Shipbuilding, Inc*., 29 BRBS 72 (1994), the Board held the authority to excuse noncompliance with § 7(d)(2)(10-day rule) rests solely with the Director and her delegates, the district directors, not ALJs.

784 F.2d at 694. It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989); *Winston v. Ingalls Shipbuilding*, 16 BRBS 168 (1984); *Jackson v. Ingalls Shipbuilding*, 15 BRBS 299 (1983). On the basis of the totality of the record, I find and conclude that Claimant has not shown either that the required report was delivered to the employer or if it was delivered late good cause, pursuant to Section 7(d). There is no evidence that the Claimant advised the Employer of his work-related injury before the date of his claim or that he requested appropriate medical care and treatment.

A claimant has established a prima facie case for compensable medical treatments when a physician finds treatment necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). In order for an employer to be liable for a claimant's medical expenses pursuant to Section 7(a), the expenses must be reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The employer must raise the issue of reasonableness and necessity of treatment. *Salusky v. Army Air Force Exchange Service*, 2 BRBS 22, 26 (1975). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 22 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984).

An employee's right to select his own physician, pursuant to Section 7(b), is well-settled. *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978); 20 C.F.R. § 702.403; *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998) *modified*, 164 F.3d 480 (1999). A claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. *Tough v. General Dynamics Corporation*, 22 BRBS 356 (1989); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978); 20 C.F.R. § 702.401(a); *but see Shoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996)(expenses may be limited to those costs which would have been incurred locally).

In *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. *Banks v. Bath Iron Works Corp.*, 22 BRBS 301, 307, 308 (1989); *Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 15 BRBS 299 (1983); *Beynum v. Washington Metropolitan Area Transit Authority*, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. *Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971); *Matthews v. Jeffboat, Inc.*, 18 BRBS at 189 (1986). The burden of proving compliance with section 7(d) is on the claimant. *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 407, 10 BRBS 1, 8 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977).

Here, the claimant has not met his burden with respect to pre-Award medical expenses, nor has he presented evidence establishing those costs. Thus, his claim for prior medical expenses is denied.

In light of my findings above that the claimant is partially and permanently disabled due to his

work-related binaural hearing loss, I find future treatment for his hearing, including new hearing aides and hearing examinations are compensable under the Act.

COMPENSATION FORMULAE[55]

Section 8 of the Act, identifies four different categories of disability and sets forth the scheme for the payment of compensation for disability for each.[56] Section 8(a) deals with permanent total disability. Section 8(b) deals with temporary total disability. Section 8(c), dealing with permanent partial disability, covers twenty different specific injuries and an additional provision which applying to an injury not included within the list of specific injuries. Section 8(d) deals with payment to survivors of certain unpaid employee benefits. Section 8(e) deals with temporary partial disability.

Permanent Partial Disability

In *Potomac Electric Power Co. (PEPCO) v. Director, OWCP*, 101 S.Ct. 509, 449 U.S. 268, 66 L.Ed. 2d 446, 14 BRBS 363 (1980), "the Court clarified the distinction between scheduled injuries, for which the claimant is limited to the compensation provided in the statutory schedule, and injuries outside the schedule for which § 908(c)(21) provides a potentially higher recovery by incorporating economic factors." *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 160(CRT)(4th Cir. 1999).[57]

Scheduled Injuries[58]

Scheduled permanent partial disabilities are compensated in accordance with section 8(c)(1)-(20). In cases of permanent partial disability of a listed member, the compensation is 66 2/3 per cent of the AWW for the proportionate number of weeks attributable to the loss of the member, under section 8(c)(1)-(20), regardless of whether earning capacity has been impaired. See *Henry v. George Hyman Construction Co.*, 749 F.2d 65, 17 BRBS 39(CRT)(D.C. Cir. 1984). The scheduled permanent disability rates are merely the minimum levels of compensation to which the employee is entitled as a result of injury and no proof of actual loss of wage earning capacity is required to receive the amount specified in the schedule for such injury. *See Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. den.*, 350 U.S. 913 (1955); *Greto v. Blakeslee, Arpaia & Chapman*, 10 BRBS 1000 (1979); *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT)(4th Cir. 1999). In awarding compensation for a scheduled

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[55] Benefits may not be awarded for pain and suffering. *Young v. Todd Pacific Shipyards Corp*., 17 BRBS 201 (1985).

[56] Section 6(b)(1) imposes a cap on both disability and death benefits equivalent to 200 percent of the national average weekly wage.

[57] When a claimant is compensated for a scheduled injury, under 33 U.S.C. § 908(c)(1-20), he may not thereafter obtain increased compensation for economic factors, such as claimed loss of wage earning capacity. *Rowe, supra*.

[58] In occupational hearing loss claims, the date of last exposure prior to the determinative audiogram should be used to calculate benefits. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 959 (9th Cir. 1998). In *Strub v. Washington United Terminals*, 35 BRBS 988(ALJ)(2002), the judge averaged results of two audiograms to award permanent partial disability and gave employer credit for proceeds of a settlement with another defendant.

permanent partial disability, the judge is not bound by any particular rating formula as to the extent of disability, including the *AMA Guides to the Evaluation of Permanent Impairment* (4th Ed. 1993). *Cotton v. Army & Air Force Exchange Service*, 34 BRBS 88 (2000).[59]

The scheduled award, pursuant to both the Board and Circuit Courts, runs for the proportionate number of weeks attributable to the loss of the member, here 200 weeks, at the full compensation rate of two-thirds of the average weekly wage. *Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391 (1983), *aff'd in relevant part, but rev'd on other grounds*, 760 F.2d 569 (5th Cir. 1985), *aff'd on recon., en banc*, 782 F.2d 513 (5th Cir. 1986).

AVERAGE WEEKLY WAGE[60]

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983) *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984); *Hoey v. General Dynamics Corporation*, 17 BRBS 229 (1985); *Pitts v. Bethlehem Steel Corp.*, 17 BRBS 17 (1985); *Yalowchuck v. General Dynamics Corp.*, 17 BRBS 13 (1985). Compensation should be calculated at the time of disability, not the time of the injury. *Johnson v. Director, OWCP*, 911 F.2d 247 (9th Cir. 1990); *Bourgeois v. Avondale Shipyards & Director, OWCP*, 121 F.3d 219, 31 BRBS 137(CRT)(5th Cir. 1997); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995)(involving a latent disability surfacing years after the

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[59] In *Hodgkinson v. Electric Boat Corp*., 35 BRBS 459 (ALJ)(2001), Judge DiNardi found the Act does not require the use of the *AMA Guides*, the Guides are not scientific and therefore fail the test of *Daubert v. Merrell Dow Paharmaceuticals, Inc*., 509 U.S. 593, 113 S.Ct. 2786, 125 L.Ed 2d 469 (1993), and should not be relied on when the claimant's treating physician disagrees. [The Fifth Edition of the Guides specifically warns it is "not intended to be used for direct estimates of work disability. Impairment percentages derived according to the Guides criteria do not measure work disability. Therefore, it is inappropriate to use the Guides' criteria or ratings to make direct estimates of work disability." It also suggests that, " The impairment evaluation, however is only one aspect of disability determination. A disability determination also includes information about the individual's skills, education, job history, adaptability, age and environmental requirements and modifications."

[60] The term "wages" is defined at § 2(13). See *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 319, 33 BRBS 15, 20(CRT)(4th Cir. 1998) for Fourth Circuit's interpretation of § 2(13). *See Universal Maritime Service Corp. v. Director, OWCP*, 155 F.3d 311, 33 BRBS 15(CRT)(4th Cir. 1999) for a comprehensive discussion of vacation, holiday and container royalty payments as wages within meaning of § 902(13). The Ninth Circuit requires reference to the IRS definition of wages. *Wausau Ins. Co. v. Director, OWCP [Guthrie]*, 114 F.3d 120 (1997) overruling *Guthrie v. Holmes & Narver*, 30 BRBS 48 (1996). *See McKnight v. Carolina Shipping Co.*, 32 BRBS 251 (1998)(*en banc*) for a summary of conflicting Circuit law on the **time period** used for calculating the AWW in the case of latent disability due to a traumatic injury. The Board finds the law of the Second and Fifth Circuits better applies § 10 than the Ninth Circuit. The former Circuits hold benefits are based on the AWW at the time of the accident which caused the injury, as opposed to the Ninth, which uses the time the disability attributed to the injury becomes manifest. *See also Ingalls Shipbuilding, Inc. v. Wooley*, 34 BRBS 12(CRT(5th Cir. 2001) regarding vacation days as part of AWW.

initial injury).[61]

The parties stipulated that the claimant's average weekly wage ("AWW") was $ 1,538.00 resulting in the maximum compensation rate of $ 933.82 with respect to the May 19, 2000 injury; while the maximum compensation rate as of 2001 to the present is $ 966.08. (TR 6). The employer contests the applicability of the 2001 rate, but did not address the reasons for doing so.

The 1984 Amendments to the Longshore Act apply a new set of rules in occupational disease cases where the time of injury, i.e., becomes "manifest," occurs after claimant has retired. *See Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2). In such cases, "disability" is defined, under Section 2(10), not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. *See* 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. *Donnell v. Bath Iron Works Corporation*, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage (NAWW) as of the date of awareness rather than any actual wages received by the employee. *See* 33 U.S.C. §910(d)(2)(B); *Taddeo v. Bethlehem Steel Corp.*, 22 BRBS 52 (1989); *Smith v. Ingalls Shipbuilding*, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.[62]

However, in the case at bar, Claimant may be an involuntary retiree if he left the workforce, at least in part, because of work-related injury problems. *See Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997). Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(c) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181, 183 and 184 (1986). *Compare LaFaille v. General Dynamics Corp.*, 18 BRBS 882 (1986), *rev'd in relevant part sub nom. LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce,

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[61] The Fifth and Second Circuits take a contrary approach and do not modify the "time of injury" language with a "date of manifestation" exception as does the Board and Ninth Circuit. *See Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157 (5th Cir. 1997)("The statutory time of injury for traumatic injuries under the LHWCA is the time of the accident causing the injury."); *Director, OWCP, v. General Dynamics Corp.*, 769 F.2d 66, 68 (2d Cir. 1985). *In Leblanc*, the Court explained *Bourgeois* did not present the issue as the employer had conceded the point.

[62] "Retirement" means "the claimant has voluntarily withdrawn from the workforce and that there is no realistic expectation that such person will return to the workforce." 20 C.F.R. § 702.601(c).

claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, as in the case *sub judice*, then he is a voluntary retiree and is subject to the post-retirement provisions. For example, in *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

The issue concerning the applicability of the 2001 compensation rate appears to concern the "date of injury" or manifestation. Here, the injuries occurred on May 19, 2000, October 31, 2001, and on July 5, 2003. I find the injury was "manifest" to the claimant on October 31, 2001, as a result of the October 31, 2001 "presumptive" audiogram which he received. However, under *Bath*, *supra*, 506 U.S. 153, 113 S.Ct. 692, 121 L.Ed.2d 619, 26 BRBS 151(CRT), the applicable AWW is not the date of awareness, but rather the date of the last injurious exposure. That was July 5, 2002, here, the date of retirement. Thus, the 2002 compensation rate applies.

The parties have stipulated and I find that the claimant's average weekly wage is $ 1,538.00 with respect to the May 19, 2000 injury (through October 31, 2001) and the maximum compensation rate as of 2001 (including 2002) to the present is $ 966.08.

INTEREST

A claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The rate is that used by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills… ." *Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 270 (1984), *modified on recon.*, 17 BRBS 20 (1985). Interest is mandatory and cannot be waived in contested cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). The Board has held that the date that employer knows of an injury and therefore incurs an obligation to pay benefits under 33 U.S.C. §914(b) is critical in determining the onset date for the accrual of interest. *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996)(retired employee with hearing loss), at 105-106; *Meadry v. International Paper Co.*, 30 BRBS 160 (1996).

Here, the employer knew of the claimant's injury on November 27, 2001 and did not initiate the payment of benefits. (CX 3). Thus, interest must accrue from that date. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

V. CONCLUSIONS[63]

The claimant is covered under the Act. I find that Mr. Lovis is partially and permanently disabled from performing his employment as a mobile equipment operator. The responsible employer/carrier is Consolidation Coal Company. The date of maximum medical improvement is October 31, 2001, at which time his disability became permanent. The maximum compensation rate for his injuries is $966.08, based on his AWW at the time of the last injurious exposure, in 2002. Furthermore, the employer is liable for all reasonable and necessary medical expenses incurred in the treatment of the claimant's partial and permanent disability, including hearing examinations and hearing aids. The claimant is further entitled to interest, at the appropriate rate on the accrued unpaid compensation benefits. The claimant is not entitled to any penalty, under section 14(e).

VI. ATTORNEY'S FEES AND COSTS

Sixty (60) days is hereby allowed to the claimant's counsel for the submission of such an application. See, 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the partes, including the claimant, must accompany the application. Parties have fifteen (15) days following receipt of any such application within which to file any objections.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The employer shall pay to the claimant compensation for his 33.23 % percent permanent partial binaural hearing loss disability for 200 weeks, based upon his average weekly wage, at the time of his retirement, July 2002.

2. Interest shall be paid by the Employer/Respondent on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. All under-payments of compensation shall be paid to the claimant in a lump sum with interest at the rate provided in 28 U.S.C. § 1961.

3. Pursuant to § 7 of the Act, the employer shall furnish such reasonable, appropriate and

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[63] It is true that Mr. Lovis suffered hearing impairment prior to his employment with Consolidation. The Act provides a remedy for such a situation, under Section 8(f), which limits liability of a subsequent employer, such as Consolidation, which hires a disabled worker. Unfortunately, no section 8(f) claim was submitted in this case and it is far too late to raise the issue which potentially could have ameliorated Consolidation's liability. Under the rationale of *Stevedoring Services of America v. Director, OWCP*, 297 F.3d 797 (9th Cir. 2002), not applicable in this Circuit, the Ninth Circuit might not place the entire liability in a case such as this on the last employer, had the worker filed a claim against the earlier employer.

necessary medical care and treatment as the claimant's work-related injury referenced herein may require, even after the time period specified in paragraph 1of the Order provision above.

4. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

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RICHARD A. MORGAN
Administrative Law Judge

APPEAL RIGHTS: Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a notice of appeal with the district director for the compensation district in which the decision or order appealed from was filed, within thirty (30) days of the filing of the decision or order, and by submitting to the Board a petition for review, in accordance with the provisions of part 802 of 20 C.F.R..